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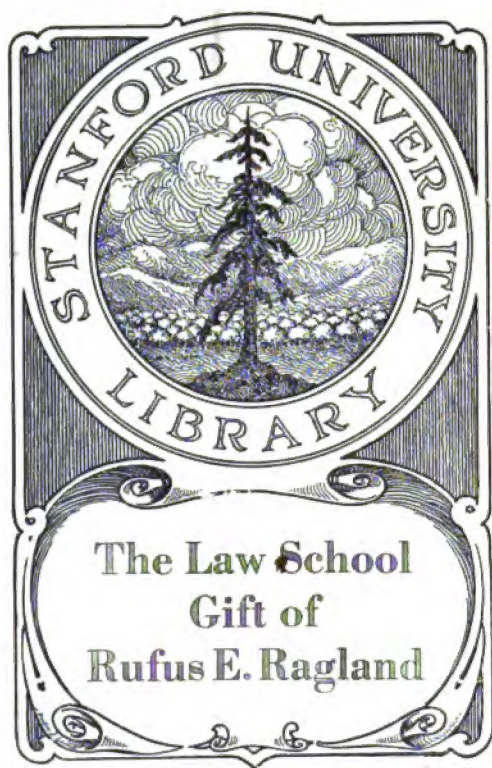
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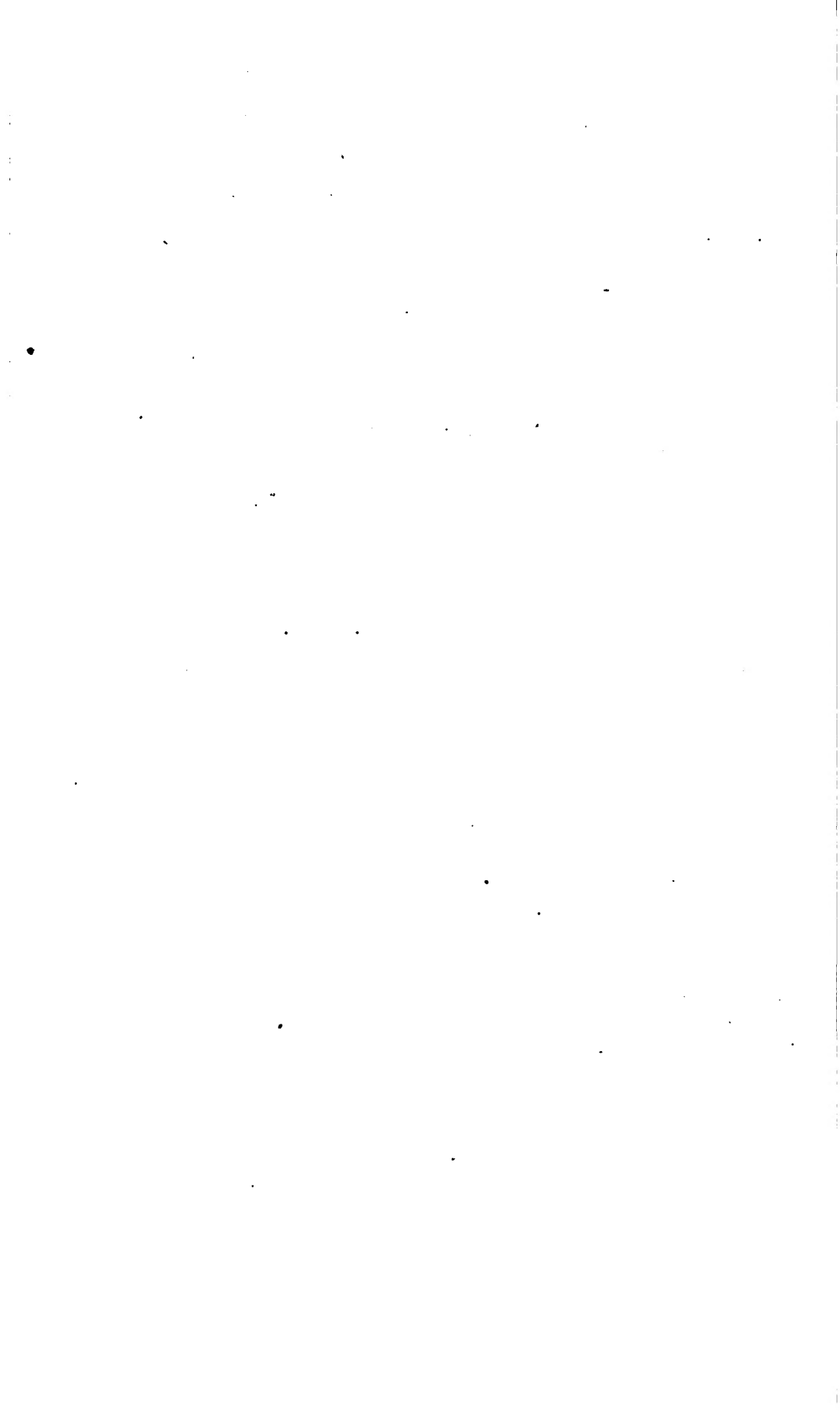
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REPORTS
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ARGUED AND DETERMINED
IN THE
English Courts of Chancery,
WITH
NOTES AND REFERENCES
TO ENGLISH AND AMERICAN DECISIONS.

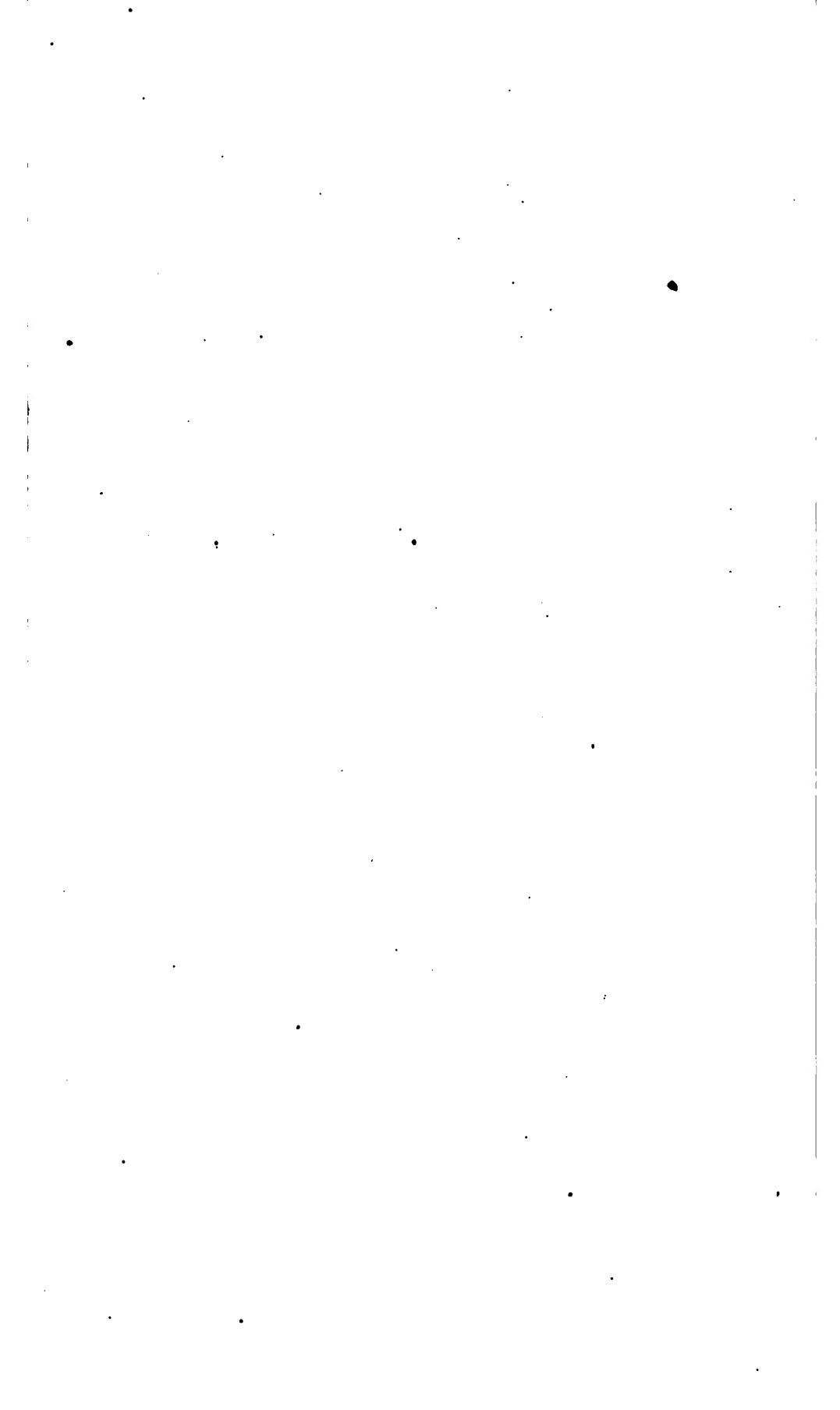
~~~~~  
By E. FITCH SMITH,  
COUNSELLOR AT LAW.  
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VOL. XXXVI.

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NEW YORK:
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1855.



REPORTS OF CASES

DECIDED IN THE

HIGH COURT OF CHANCERY,

BY THE

RIGHT HON. SIR LANCELOT SHADWELL,

VICE-CHANCELLOR OF ENGLAND.

~~~~~  
BY NICHOLAS SIMONS,

OF LINCOLN'S INN, ESQ., BARRISTER AT LAW.  
~~~~~

WITH NOTES AND REFERENCES

TO ENGLISH AND AMERICAN DECISIONS,

By E. FITCH SMITH,

COUNSELLOR AT LAW.

VOLUME XIII.

CONTAINING CASES IN 1842, 1843 & 1844, WITH A FEW IN 1845.

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LORD LANGDALE, . . . *Master of the Rolls.*

SIR LANCELOT SHADWELL, . . . *Vice-Chancellor of England.*

SIR JAMES LEWIS KNIGHT BRUCE, }
SIR JAMES WIGRAM, . . . } *Vice-Chancellors.*

SIR FREDERICK J. POLLOCK, . . . *Attorney-General.*

SIR WILLIAM WEBB FOLLETT, *Solicitor-General.*

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REPORTS OF CASES
 ARGUED AND DETERMINED
 IN THE
 HIGH COURT OF CHANCERY,
 BEFORE THE
 VICE-CHANCELLOR.

MORRIS v. ELLIS.

*Construction.—Tithe Commutation Act.—Evidence.—Pleading
 Supplemental Bill.*

1842: 28th May.

Pending a suit for tithes, between a rector and an occupier, (in which the latter set up a modus,) the tithe commutation act passed; and, in the course of the proceedings under it, an action was brought, in pursuance of one of its enactments, by the rector against the land owner, in order to try the validity of the modus. At the trial, a verdict was found against the modus. Held, that the verdict was admissible as evidence against the occupier, and, consequently, that the rector was entitled to file a supplemental bill, for the purpose of putting the proceedings at law in issue in his suit against the occupier; and that, too, notwithstanding the act enacts that nothing therein contained shall affect the right to any tithes become due before the commutation.

In 1820, the plaintiff, who was the rector of the parish of Shelfhanger, in Norfolk, filed a bill against the defendant, who occupied a farm in the parish, called Shelfhanger Hall Farm, as tenant to the Duke of Norfolk, for an account and payment of the tithes of the farm for the then last six years. The defendant, in his answer, insisted that a modus of 14*l.* a year was payable to the rector, in lieu of all the tithes of the farm.

In 1831, and before any further proceedings were had in the

1842.—*Morris v. Ellis*.

suit, the defendant died, and the suit was revived against his executors.

- [*2] *In November, 1841, the plaintiff filed a bill against the executors, which, after stating the proceedings in the original suit, alleged, by way of supplement, that, in October, 1838, the commissioners appointed under the tithe commutation act, (6 & 7 Will. IV, c. 71), determined to ascertain and award the rent charge to be paid instead of the tithes of the parish: that the plaintiff had lately discovered that the original suit was defended by and at the expense of the Duke of Norfolk; and that it was agreed between the duke and the deceased defendant to that suit; and the executors of the latter, that the duke should pay whatever, if anything, in the result of the suit, should be coming to the plaintiff; and that the deceased defendant did, in fact, occupy the farm free from tithes, as between himself and the duke, or at least free from tithes to any larger amount than the alleged modus of 14*l*.: that, under the circumstances aforesaid, a question arose between the plaintiff and the duke, touching the validity of the alleged modus; and that the assistant commissioner appointed for the purpose of ascertaining and awarding the rent charge to be paid as before mentioned, having heard the question discussed, by his award, dated the 25th of June, 1839, determined that the modus was valid: that the plaintiff, being dissatisfied with the assistant commissioner's decision, brought an action in the Court of Exchequer, against the Duke of Norfolk, under the authority of the act, and delivered a feigned issue therein for the purpose of trying the validity of the modus: that the issue was tried, and a verdict found for the plaintiff: that the duke afterwards moved for a new trial of the issue, but the motion was refused: that the plaintiff was advised that, by such proceedings, the validity of the alleged modus had been disproved, and
- [*3] the plaintiff's right to the tithes in *kind of the farm, conclusively established: that, after the decision upon the motion for a new trial, the plaintiff's solicitors wrote to the defendants' solicitors, who were also the duke's solicitors, requesting to be informed whether the defendants intended to defend the suit; but their solicitors returned no answer.

The prayer of the bill was as follows: "[that this present bill may be taken as supplemental to the said original bill and bill of revivor; and that it may be declared by this court, that, by virtue and effect of the said issue and the verdict therein, and the refusal of the said motion, the said alleged modus has been, by due course of law, ascertained to be invalid, and your orator's right to tithes in kind of the said lands, conclusively established; or, otherwise, that your orator may have the benefit, upon the hearing of the said cause so instituted by such original bill as aforesaid, of the said proceedings at law, and especially of the said verdict;] and that your orator may have, as against the defendants, all such relief as is prayed by the original bill."

The defendants demurred, for want of equity, to all the matters alleged by way of supplement, and also to that part of the prayer which is enclosed in brackets and they answered the rest of the bill.

Mr. Boteler and Mr. Shadwell in support of the demurrer, said that the matters alleged by way of supplement, were wholly immaterial as between the plaintiff and the defendants, the executors of the deceased defendant: that everything that had taken place under the tithe commutation act, took place between the plaintiff and the Duke of Norfolk, and, therefore, was *res inter alios acta*; and, moreover, that it took place *after the [*4] death of the deceased defendant, and, therefore, could not be used against his executors: that the bill was filed for relief, and not for discovery only: that it did not merely pray that what had been done under the act, might be received as evidence of the plaintiff's right to tithes in kind; but asked that it might be declared that, by the verdict found on the trial of the issue, and by the refusal of the motion for a new trial, the modus had been, by due course of law, ascertained to be invalid, and the plaintiff's right to tithes in kind *conclusively established*: that the right to the tithes sought to be recovered, accrued many years before the passing of the commutation act: that the action was brought under the 44th section of the act; and the 89th section enacted that nothing in the act contained, should affect any right

1842.—*Morris v. Ellis.*

to any tithes which should have become due before the commutation; and, consequently, the bill sought to give the act an effect which the Legislature had expressly provided that it should not have.

The cases cited in support of the demurrer, were, *Wetherell v. Weighall*,^(a) *Girdlestone v. Stanley*,^(b) and *Adams v. Dowding*.^(c)

In the course of the argument in support of the demurrer, the Vice-Chancellor said: "Suppose that a bill was filed against A., the occupier of a farm, and that he set up a modus and died; and then another person became occupier, and another bill was filed against him, and he set up the same modus; and that it was determined, in the second suit, that there was no modus; and, afterwards, the first suit was revived and prosecuted: [*5] would not what had taken place in the *second suit, be receivable as evidence in the first?—The object of the supplemental bill in this case, is to obtain evidence to be used in the original suit; and the question is, whether what has taken place under the tithe commutation act, may not be given in evidence. If the proceedings which have taken place under the act may be given in evidence, they must be put in issue; and, if so, how can the supplemental bill, which has put them in issue, be wrong?—Suppose that the plaintiff, after he had filed his original bill, had discovered that, several years prior to the commencement of his suit, a former rector had instituted a suit against the then owner of the farm, and that, in that suit, the modus had been determined not to be good; might not the plaintiff have either amended his bill or filed a supplemental bill, for the purpose of putting that fact in issue? If an antecedent fact would be receivable in evidence, why would not a subsequent fact also be receivable? I can easily conceive that what has taken place in this case under the act of Parliament, may not bind the right; but the question is, whether it is not receivable in evidence."

(a) 3 Youn. & Coll. 243.

(c) 2 Madd. 53.

(b) Ibid. 421.

1842.—*Morris v. Niles*.

Mr. *Bethell* and Mr. *Stidbottom*, in support of the bill, said that the words of the 89th section of the act, were that nothing in the act contained should affect any right to any tithes which should have become due before the commutation; and that those words were not equivalent to saying that any proceeding that had taken place under any of the enactments of the act, should not be receivable as a matter of evidence: that the plaintiff, if he had not adduced any evidence in support of his right to tithes in kind, would have been entitled to an issue as a matter of course; and that *too, notwithstanding the defendant [*6] might have adduced the strongest possible evidence in favor of the *modus*; and, therefore, it could not be reasonably insisted that he was not entitled to avail himself of the issue that had been tried, and of the result of the trial, which had been satisfactory to the judges of the court in which the action had been commenced: and that there were many cases which decided that a verdict in an action against one occupier, was receivable as evidence against another occupier.

Mr. *Boteler*, in reply, referred to the 46th section of the act, as showing that the land owner and the tithe owner were the only persons who were to be bound by the verdict. He referred to the 89th section also, and said the court could not, as the plaintiff's counsel had contended, separate the act from what had been done under it.

THE VICE-CHANCELLOR:—It appears to me that the language of the 89th section of the tithe commutation act, has no application to the present case.

It happens that under the machinery of the act, an issue has been directed, since the institution of the original suit, in order to try the validity of the same *modus* as was set up, in that suit, by way of defence to the plaintiff's claim to the tithes in kind; and on the trial of that issue, the jury have found, in effect, that the *modus* is invalid. I am not, however, now asked to look at the finding of the jury as conclusive of the plaintiff's right in this suit, but only as a matter of evidence in support of that right; and I cannot but think that it is receivable for that purpose.

 1842.—Attorney-General v. Gladstone.

[*7] *Suppose that, instead of the matter taking the course which it did, the Duke of Norfolk had written a letter to the commissioner, saying that he was willing to admit that the *modus* was not good. That, certainly, would not have been a proceeding under the act; but the act would have given rise to it. There could be, however, no doubt that the letter would have been receivable in evidence. And if that be the case, is not a verdict given on the trial of an issue between the tithe owner and the land owner, admissible as evidence? which is all the plaintiff in this case contends for.

My opinion is that it was competent to the plaintiff to put in issue, by his supplemental bill, the facts which he has stated in it, in order that he might prove them at the hearing of the cause: and, therefore, I shall overrule the demurrer.

THE ATTORNEY-GENERAL v. GLADSTONE.

Charity.—Legacy.—Lapse.

1842: 10th June.

Testator gave to T. R. 15,000*l.*, to be by him applied for the use of Roman Catholic priests, in and near London, at his absolute direction. T. R. died in the testator's lifetime. Held, that the legacy was not void for uncertainty, and did not lapse by T. R.'s death in the testator's lifetime, but was good as a charitable legacy; and that it must be applied for the benefit of persons filling the character of Roman Catholic priests in and near London, at the testator's death, and afterwards, according to a scheme to be approved by the master.

CHARLES ROBERT BLUNDELL, Esq., made his will dated the 28th of November, 1834, and thereby, after disposing of his real estates, gave the following legacies and annuities:

[*8] "To the Right Rev. Dr. Walsh, the sum of 5,000*l.*, to be by him applied for the purposes of Oscot College *in Staffordshire: To the Rev. Thomas Robinson, 4,000*l.*, to be by him applied to the use of Ampleforth College in Yorkshire: To the said Thomas Robinson the further sum of 4,000*l.*, to be by

him applied to the use of Downside College in Somersetshire: To the said Thomas Robinson the further sum of 4,000*l.*, to be by him applied to the use of Old Hall Green College in Hertfordshire: I also give, to the said Thomas Robinson, the further sum of 15,000*l.*, to be by him applied for the use of Roman Catholic priests in and near London, at his absolute discretion: And I give to the said Thomas Robinson, the sum of 2,000*l.* for Lydiate Roman Catholic Chapel: all which before mentioned pecuniary legacies I direct to be paid, immediately after my decease, out of such part of my personal estate as is legally applicable thereto: And I give, out of my personal estate, the following annuities: To the incumbent priest, at the time of my decease, of the Roman Catholic chapel at Formby, 60*l.* a year for his life: To the incumbent priest, at the time being of my decease, at Ince, 100*l.* a year for his life." The testator then made several bequests, and gave the residue of his personal estate to the Right Rev. Dr. Bramstone and the Right Rev. Dr. Walsh, and appointed John Gladstone, Robert Gladstone and Thomas Robinson trustees and executors of his will.

Robert Gladstone, Thomas Robinson and Dr. Bramston died in the testator's lifetime. The testator died in December, 1840.

Counsel having advised that the legacy of 15,000*l.* could be supported as a *charitable* legacy, but not otherwise; and that, by reason of the death of Mr. Robinson in the testator's lifetime, the trust upon which that legacy was given, must be administered by the *Court of Chancery, an information was [*9] filed, at the relation of several individuals who were Roman Catholic priests residing in and near London, against John Gladstone and Dr. Walsh, stating that the legacies given to Dr. Walsh and Mr. Robinson, were, all of them, charitable legacies: that the colleges mentioned in the will, were colleges for the education of Roman Catholics for the priesthood and otherwise: that the testator was a Roman Catholic, and Robinson a Roman Catholic priest: that the legacy of 15,000*l.* did not lapse or fail by the death of Robinson in the testator's lifetime; but the charitable use remained, and was still in full force, for the benefit of

1842.—Attorney-General v. Gladstone.

the Roman Catholic clergy in and near London; and the administration thereof had devolved on the court; but that Dr. Walsh, as the surviving residuary legatee under the will, questioned the validity of the legacy. The information prayed that the charitable use for the benefit of Roman Catholic clergy in and near London, might be established; and that the legacy of 15,000*l.* might be invested and secured; and that the master might be directed to settle a scheme for the regulation and disposal of it.

Mr. *Bethell* and Mr. *Campbell* for the relators:—The testator has associated the legacy in question, with several other legacies which are plainly charitable; and he has directed that legacy, as well as the others, to be paid out of such part of his personal estate as was legally applicable thereto. It is clear, therefore, that the testator considered the legacy as a charitable one. It is not a gift to the Roman Catholic priests in and near London, but to Roman Catholic priests in and near London. Consequently, it is not a gift to any existing class of individuals exclusively; but the testator intended it to be a permanent endowment for the [*10]. *support of the clergy of the Romish church in London and its neighborhood, the benefit of which was ultimately to enure to their congregations. Where any particular priests are the objects of his bounty, he makes a provision for them, not permanently, but during their lives only.

The following cases show that bequests similar to the one now under consideration, are charitable bequests. *Attorney-General v. Guise*,(a) *Loyd v. Spillet*,(b) *Attorney-General v. Cock*,(c) *Grieves v. Case*,(d) *Attorney-General v. Comber*,(e) 1 Eq. Abr. 95, *Attorney-General v. Bishop of Chester*,(f) *Brodie v. Duke of Chandos*,(g) *De Costa v. De Pas*,(h)

Mr. *Rolt* appeared for the defendant Gladstone.

(a) 2 Vern. 266.

(b) 3 P. Wms. 344.

(c) 2 Vez. 273.

(d) 1 Ves. jun. 548.

(e) 2 Sim. & Stu. 93.

(f) 1 Bro. C. C. 444.

(g) Ibid. note.

(h) 1 Ambl. 228.

 1842.—Attorney-General v. Gladstone.

Mr. *Purvis* and Mr. *Bagshawe* for the defendant Dr. Walsh, said that the court could not give effect to the bequest in question: that the testator intended to benefit only Roman Catholic priests existing in and near London at his death; and, if he had intended to benefit their successors, the law would have prevented his intention from being carried into effect; *Attorney-General v. Power*,^(a) that it appeared, from the information, that there were both officiating and non-officiating Roman Catholic priests in and near London; and, if the non-officiating priests were to participate in the benefit of the bequest, it could not be held to be a bequest for a charitable purpose: that the important word, "poor," *was omitted; Duke's Char. Uses. 125: [*11]

that the word "near" was so indefinite that it was impossible for the court to say, judicially, what it meant; that the subject of the bequest was to be applied according to the absolute discretion of Mr. Robinson; which it could not be, as that gentleman had died in the testator's lifetime.

Mr. *Bethell* in reply, referred to *Moggridge v. Thackwell*,^(b) where the court directed the master to approve of a scheme for the application of the testatrix's residuary estate, notwithstanding the testatrix had given it to a trustee, with a direction that he should dispose of it in such charities as he might think fit.

THE VICE-CHANCELLOR:—Looking at the language of the will, I am of opinion that the legacy of 15,000*l.*, was given for the benefit of persons who, either at the testator's death or at any time thereafter, might bear the character of Roman Catholic priests in and near London. No objection arises from the indefinite nature of the word "near;" because, if the fund is given for a charitable purpose, the court can solve the difficulty with regard to its application, by directing a scheme to be approved by the master.

The language of the will is: "I give and bequeath out of my personal estate, the following legacies: To the Right Rev. Dr.

(a) 1 Ball & Beatt. 145.

(b) 1 Ves. jun. 464, and 7 Ves. jun. 36.

Walsh, of Wolverhampton, the sum of 5,000*l.*, to be by him applied for the purposes of Oscot College, Staffordshire: To the Rev. T. Robinson, of Steel street, Liverpool, 4,000*l.*, to be by him applied to the use of Ampleforth College in Yorkshire: To the *said Thomas Robinson the further sum of 4,000*l.*, to be applied to the use of Downside College in Somersetshire: To the said Thomas Robinson the further sum of 4,000*l.*, to be by him applied to the use of Old Hall Green College in Hertfordshire." The expression made use of in the first of these bequests, is: "to be by him applied for the purposes of;" and, in the others, "for the use of;" and the term "college" implies an institution of an enduring nature. Then, after these four bequests, follows that upon which the question arises: "To the said Thomas Robinson the further sum of 15,000*l.*, to be by him applied for the use of Roman Catholic priests in and near London, at his absolute discretion." The same language is here used as had been, just before, employed with respect to the legacies given for the benefit of the colleges, except that, in the first bequest, the word "purpose" is used instead of the word "use:" and there is nothing in the words: "for the use of Roman Catholic priests," which shows that it was the testator's intention to confine the benefit of the bequest more to those Roman Catholic priests who might happen to be living at the testator's death, or at the death of Mr. Robinson, than to those Roman Catholic priests who might come into *esse* after the death of the testator, and before the death of Mr. Robinson, or at any time after the death of both of them. The probability is that the Roman Catholic as well as the Protestant church, will last as long as the world endures; and, therefore, the words of the testator must, in my opinion, be construed as importing perpetuity, and not as being confined to individuals living at any given period. Moreover, the next gift in the will, is a gift to a Roman Catholic chapel: so that the legacy in question is preceded by bequests for purposes that must endure, and followed by one of the same nature.

*In a subsequent part of the will, where the testator [*13] meant that particular priests should take a benefit, he has

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used different language. He says: "I give, out of my personal estate, the following annuities: To the incumbent priest, at the time of my decease, of the Roman Catholic chapel at Formby, 60*l.* a year for his life: To the incumbent priest at the time being of my decease, at Ince, 100*l.* a year for his life." So that it seems to me that, where the testator meant to give a benefit to an individual answering a particular description, he has expressed that intention with great clearness. And, upon the whole, I think that the fair construction of the bequest in question, is that it was intended for the benefit of persons filling the character of Roman Catholic priests in and near London, both at the testator's death and afterwards.

I shall therefore declare that the purpose for which the legacy of 15,000*l.* is given, is a charitable use, and refer it to the master to settle a scheme for the application of the legacy.

***THE COMMISSIONERS OF CHARITABLE DONATIONS AND [*14]
REQUESTS IN IRELAND, v. DEVEREUX.**

Legacy Duty.—Domicil.

1842: 30th June.

A British subject went to settle in France, in 1762, and afterwards purchased an estate, and became naturalized there. In 1791 he left France, and came to England, in consequence of the French Revolution, and, shortly afterwards, his property was confiscated by the revolutionary government. In January, 1802, he made a will in London, by which he left his property partly to a charity in Ireland, and partly to individuals resident in England, and appointed one of those individuals his executor. In April, 1802, emigrants were permitted to return to France, and, soon afterwards, he returned to that country. In 1804, he made a will in Paris, in which he stated that he was born at Waterford, and had come to France to obtain restitution of his estate; and, after referring to his former will (which he had mislaid in London,) he recapitulated, very nearly, its contents, and concluded by expressly confirming it. He died in Paris, in 1806, and his two testamentary papers were proved both in France and in England. Under the treaty of peace between England and France, in 1815, a large sum of French stock was set apart by the then French government, for the purpose of compensating British subjects whose property had been confiscated by the Revolutionary

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government, and part of that sum was awarded, by commissioners appointed by the British government, to the testator's executors, for the loss of the testator's property in France. The commissioners, under the powers of an act of Parliament, sold the stock so awarded, and paid the proceeds into the court of Chancery. Held, that the testator was domiciled in France at his death, and that the fund in court was not subject to legacy duty.

A PETITION presented by the plaintiffs in this cause was, in substance, as follows: In 1762, James Fanning, a native of Ireland, went to reside permanently in France, and, in 1776, obtained letters of naturalization and nobility in that country, by virtue of which he and his wife assumed and used the titles of Comte and Comtesse Fanning, and he was to all intents and purposes, domiciled in France. In April, 1777, he purchased an estate there, called La Roche Talbot. In 1791, in consequence of the Revolution of 1789, he left France and [*15] came to England; and, shortly afterwards, *was proclaimed an emigrant, and his real and personal property was confiscated by the French government.

He remained in England until October, 1802; and on the 15th of January in that year, he made a will, by which, after describing himself as proprietor of the estate of La Roche Talbot, and as then *lodging* in a house near Manchester square, London, he bequeathed all his worldly substance, subject to the payment of his debts and legacies, to his kinsman, the defendant Devereux, then of the county of Wexford, his friend the Rev. Daniel MacCarthy, who, before the Revolution, was a canon of the cathedral of Chartres, and Edward Christian, of High Holborn, London. He then gave an annuity of 40*l.* sterling to his niece Catharine Macnamara, of the city of Waterford, for her life, and in order to provide for it, directed a sum sufficient to produce 40*l.* sterling, to be put out to interest. He also bequeathed to his niece, his plate and linen that was lodged in the hands of Messrs. Quan of Waterford: and then disposed of two estates in North America, by giving one to Le Baron Beaufort, then lodging near Manchester square, and the other to the defendant Devereux; and he appointed that gentleman and Messrs. MacCarthy and Christian his executors.

In April, 1802, a law was made in France, by which emigrants were allowed to return to that country, and Fanning soon afterwards returned to and continued to reside in France until his death.

In September, 1804, he made another will, dated Paris, the 17th of that month, which was partly as follows: "I, James Fanning, born in the city of Waterford, in the kingdom of Ireland, have made my will in *London, in the month of [16] January, 1801,(a) and deposited in the hands of my friend Edward Christian, of High Holborn, London; and this deposition took place before my departure thence for this country, whither I am come to claim the restitution of the acquisition I have made in it of the lands of La Roche Talbot; which I expected would have been, without difficulty, restored to me; but, hitherto, my endeavors have been ineffectual. However, I hope that as what I demand is an act of justice, it will be granted to me. The copy of my last will, as set forth in my said testament, is probably mislaid, as I cannot find it. I, therefore, mention in this writing, the principal articles contained in it; not in anywise doubting that my property in this country will be restored to me, or that I shall receive a just indemnity for it, as well by reason of the opposition placed upon my revenues since the commencement of the French Revolution, as for the seizure of my plate, linen, books, household furniture, cattle, &c., &c. Consequently, after the payment of my just debts, I bequeath my said property in the following manner: one third part of my said property for charitable uses, for the relief of the poor of the city of Waterford, excepting one tenth part of the said one third part of my said property; which one-tenth I desire may be laid out for the relief of the poor of the parishes of Luffaney, Ballygory and Windyhouse, and likewise the poor of the parishes of Castlebanny and Rochestown, all these parishes being in the county of Kilkenny. I bequeath one third part of my said property to my friend and relation, Edward Devereux, Esq., a native of Wexford; and he is to be paid (independent

(a) The first will was dated in January, 1802. The testator had, probably, forgotten the exact date of it.

[*17] *of the one-third part of my property, which I bequeath to him) the amount of money he has had the friendship to supply me with, since his arrival in Paris, to enable me to subsist. The other third part of my property I bequeath to my kinsman, Januarius Fanning, of the city of Naples. The whole of the above property to be subject to an annuity of 60*l.* sterling Irish money, to be paid to my niece, Catharine Macnamara." The testator then gave part of his lands in North America to the defendant Devereux, another part to Edward Christian, and the remainder to the Baron De Beaufort, and confirmed his last will and testament in every respect, excepting that he revoked the nomination therein of Daniel MacCarthy as one of his executors, (that gentleman residing in London and the testator's property being in France,) and he named the Rev. Dr. Walsh, provisor of the United English, Scotch and Irish colleges, and the defendant Devereux, his executors.

The testator died in Paris on the 2d of August, 1806; and soon afterwards his two testamentary papers were proved, by Devereux alone, in France, and also in the Prerogative Court of the Archbishop of Canterbury.

The petition, after stating as above, alleged that, from the time when Fanning first went to reside in France down to his death, he constantly resided in that country, except only during the time whilst, in consequence of the public disturbances in France, he was absent as an emigrant therefrom; and that, during the period aforesaid and at the time of his death, he had his domicile in France: that, by the fourth additional article of the definitive treaty of peace between England and France, concluded on the 30th of May, 1814, it was stipulated that, after the rati-
 [*18] fication of *the treaty, the sequestrations which, since the year 1792, had been laid on the funds, revenues, credits or other effects of the subjects of the two countries, should be taken off, and that commissioners mentioned in the second additional article of the treaty, should undertake the examination of the claims of British subjects upon the French government, for the value of property, movable or immovable, illegally confis-

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cated by the French authorities: that by a convention entered into at Paris on the 20th of November, 1815, in conformity to the ninth article of the definitive treaty of peace, between France and the Allied Powers, concluded on the 20th of November, 1815, relative to the examination and liquidation of the claims of British subjects on the French government, it was stipulated that a capital producing an interest of 3,500,000 francs, commencing from the 22d of March, 1816, should be inscribed, as a fund of guarantee, in the great book of public debt of France, in the names of two or four commissioners, the one half English and the other half French, chosen by their respective governments: that by a commission, dated the 27th of December, 1815, under the great seal of the United Kingdom, certain persons were appointed commissioners of liquidation, arbitration and deposit, for the purpose of carrying into effect, on the part of his Majesty, the provisions contained in the convention of the 20th of November, 1815: that the commissioners caused to be inscribed in a register, the names of all the claimants who presented themselves within a period prescribed by the convention, and caused to be paid, out of the fund of guarantee, certain sums producing in the whole 2,945,895 francs of yearly revenue, to various persons whose names were inscribed in the register: that a further convention was signed, at Paris, on the 25th of April, 1818, for the final arrangement of the claims of British

*subjects upon the French government, by the first ar- [*19]
 ticle of which it was agreed that, in order to effect the payment and entire extinction of the capital and interest due to British subjects, there should be inscribed, in the great book of the public debt of France, a perpetual annuity of 3,000,000 francs, which should bear interest from the 22d of March 1818; and it was stipulated that such part of the annuity of 3,500,000 francs as was then disposable, should be equally applicable to the payment of the said claims, and, in consequence, that the inscriptions of that annuity should be delivered over to the commissioners of his Britannic Majesty immediately after the exchange of the ratification of the convention now in statement; and that the annuity of 3,000,000 of francs should be divided into 12 inscriptions of equal value, and should be inscribed in the names of the com-

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missioners, and should be made over to them, at the rate of one per month, to begin from the day of the exchange of the ratification of the last mentioned convention: that, by a commission under the great seal of the United Kingdom, dated the 15th of June, 1818, his Majesty appointed certain persons therein named to be his commissioners of liquidation, arbitration and award, for the purpose of acting, on behalf of his Majesty in England, according to the provisions of the before mentioned conventions, and to take into consideration all the claims of his Majesty's subjects which might have been, at due times and in proper form, presented to them, and to award the payment of such sums as might appear to be justly due to his Majesty's subjects; and, by another commission of the same date, his Majesty appointed two other commissioners to be his commissioners of deposit, to receive from the government of France, the inscriptions to be de-

livered over to the British commissioners in pursuance of [*20] the *conventions before mentioned: that by the 59th Geo.

III, c. 81, the commissioners of liquidation, arbitration and award were empowered to apportion and distribute the sums stipulated, by the conventions, to be provided by France, and to order the same to be paid to and among the several claimants whose names were duly registered, and whose claims should be allowed: that the act further enacted that, during the time that any capital inscribed in the great book of the public debt of France in pursuance of the conventions, or any part of such capital, should remain in the names of the commissioners of deposit, and should not have been appropriated to the liquidation of any claims of his Majesty's subjects, it should be lawful for the commissioners of deposit, on receiving directions to such effect from the secretary of state for foreign affairs and from the commissioners of the treasury, to sell and dispose of the whole or any part of the capital so inscribed and unappropriated, and to transfer the proceeds to England, to the commissioners of liquidation, arbitration and award, to be by them invested in exchequer bills or other public securities, for the purpose of being applied to the payment or liquidation of any such claims, or, in case all such claims should be paid or liquidated, for such other purposes as the commissioners of the treasury should direct the commission-

ers of liquidation, arbitration and award to apply the same; and all such exchequer bills and other public securities should be deposited in the Bank of England to the account and in the names of the commissioners of liquidation, arbitration and award, and should be and remain in the names of such commissioner, to be sold, and the produce thereof paid and applied for the purposes therein specified.

The petition further stated that Devereux preferred *three claims to the commissioners of liquidation, arbitration and award, in respect of the testator's property [21] which had been confiscated as before mentioned, and that the commissioners, by their award dated the 29th of September, 1820, awarded 41,998 francs of annual *rentes*, for the value of the testator's immovable property, and, by another award, dated the 18th of January, 1821, awarded 468 francs of like *rentes* for the value of the testator's movable property, and, by another award of the 23d of January, 1821, awarded 7,151 francs of like *rentes*, for the value of certain wood on the testator's estate, which had been cut down and sold during the occupation of it by the French government.(a) The petition further stated, that various sums of the said *rentes*, to the amount of 55 per cent. on the sums awarded, were transferred to Daniel Reardon, as the agent and on behalf of Devereux, leaving 45 per cent. to be still liquidated and satisfied: that, in July, 1822, the plaintiffs (who were empowered, by act of Parliament, to sue for charitable donations and bequests, and to apply the same according to the intentions of the donors) filed their bill in this suit, against Devereux and others, praying that an account might be taken of the sums awarded and transferred to Devereux and his agent or either of them, as before mentioned, and that what should appear due in respect of the charitable bequests made by the testator as before stated, might be paid or transferred to the plaintiffs: that, in such suit, the amount of the remaining 45 per cent. of the *rentes*

(a) The treaties, conventions and act of Parliament referred to in the text, and the particulars of the claims made by Devereux, and the awards made and other acts done thereupon by the commissioners, are more fully stated in *Hill v. Reardon*, 2 Russ. 608.

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awarded as aforesaid, was converted into sterling money, [*22] and paid into court by *the commissioners of deposit under the powers contained in the act of Parliament; and the money so paid in, was invested under the direction of the court: that, under the decree and orders in the cause, the amount due to the plaintiffs, in respect of the charitable bequests, was ascertained, and certain sums of bank annuities and cash were ordered to be transferred and paid, to the plaintiffs, out of the stock and cash in the cause, on account of what had been so found due to them: that, after the last of those orders was made, a claim was set up, on behalf of the crown, for legacy duty in respect of the charitable bequests; in consequence of which it was agreed that 4,000*l.* bank annuities, part of the bank annuities ordered to be transferred to the plaintiffs, should be set apart to answer such claim, if any, as the crown might have; but the petitioners were advised that no legacy duty was payable in respect of the charitable bequests: The petition, therefore, prayed that the 4,000*l.* bank annuities, together with the dividends which had accrued thereon, might be transferred and paid to the petitioners.

Mr. *Bethell* and Mr. *Faber* in support of the petition:—Several years before the Revolution, Mr. Fanning went, with his wife and family, to settle in France; and obtained letters of naturalization and nobility, and purchased an estate in that country. He continued to reside in France, under his French title, and as a French subject, until he was compelled to fly, in consequence of the atrocities of the revolution, first to Flanders, and afterwards to this country. During his absence from his adopted country, he was proscribed as a French emigrant, and his property was confiscated as being the property of an emigrant. He remained in England until some time in the year 1802; when a law [*23] having been *made by the French government, allowing emigrants to return to France, he lost no time in taking advantage of that law, and returned to that country. During his temporary and compulsory absence from the country in which he had fixed his domicil, he made a will; and it is very important to see how he describes himself in that instrument. He says:

"I, James Fanning, proprietor of the estate of La Roche Talbot and its dependencies, situate in the department of La Sarthe, in France, now lodging at No. 8 William street, Manchester square, London." Therefore he speaks of himself as a French landed proprietor, and as a mere temporary resident in this country. In October, 1802, he returned to France, and never quitted it until his death, which took place in 1806. In 1804, he made a codicil or second will, in consequence, as he recites, of his former will having been mislaid; and, after disposing of his property in very nearly the same manner as he had disposed of it before, he confirms his former will in every respect, except that he appoints Dr. Walsh (who seems to have been the president of a college in Paris) one of his executors, in the place of Mr. MacCarthy, who was one of the executors of his prior will, and was resident in London. Both the testamentary papers were proved by Mr. Devereux, in France; so that the character of personal representative of the testator, was sought by Mr. Devereux in, and was awarded to him by the courts of France.(a)

There is a material distinction between probate duty and legacy duty. The former is payable in respect of *all [*24] the testator's property which is within the jurisdiction of the Ecclesiastical Court;(b) but legacy duty does not attach unless the testator was domiciled, at his death, within the operation of the fiscal laws of this country. It is true that, in *Logan v. Fairlie*,(c) Sir John C. Leach, V. C., decided that the property of a testator who died in India, which was remitted to this country, was subject to legacy duty; but the decision in that case was reversed by the Lords Commissioners,(d) on the authority of *The Attorney-General v. Jackson*.(e) In *in re Ewin*,(g) the prop-

(a) The testamentary papers were, as is mentioned in the previous part of the case, proved in England as well as in France. The observations at the end of the brief for the petitioners, stated that the English probate was taken in respect of property under 100l.

(b) See *Pearce v. Pearce, ante*, Vol. IX, p. 430, and the cases there cited.

(c) 2 Sim. & Stu. 284.

(d) 1 Myl. & Cr. 69.

(e) 8 Bligh, 15, and 2 Cl. & Fin. 48, nom. *Attorney-General v. Forbes*.

(g) 1 Crom. & Jerv. 161 & 1 Tyrw. 91.

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erty of a testator which was in India at his death, but was afterwards remitted to his executor in this country and paid over to the legatees, was held to be subject to legacy duty, on the ground that the will was the will of a person who was domiciled in this country. In *Arnold v. Arnold*(a) the testator was domiciled and died in India; but some of his executors were resident in this country, and his will was proved here as well as in India; and his property was remitted to the English executors for the purpose of being administered in England; and it was administered under the decree of this court. Nevertheless Lord Cottenham, C., held that, as the testator was not domiciled, at his death, within the operation of the fiscal laws of this country, his property was not liable to legacy duty. The decision in *In re Bruce*(b) was founded on the same principle.

[*25] Now, what are the facts of the present case? The *testator went to France so long ago as the year 1762, and fixed his residence there. He continued to reside in France until 1791, when he was forced to quit it in consequence of the disturbances that then took place. He returned to France as soon as he was able, and remained there, without once quitting it, until his death. He, therefore, acquired a domicile in France, and did not lose it by his temporary and compulsory absence in this country. *Munroe v. Douglas*.(c) As then the testator was domiciled, at his death, in a country not in any way subject to the laws of the United Kingdom, his property (which, indeed, had no existence in England until long after his death) is not subject to legacy duty: and consequently the claim made by the crown, cannot be sustained.

Sir. F. Pollock (Attorney-General) and Mr. Romilly for the crown:—The question in this case, may be divided into three parts: first, the *status* of the testator; second, the nature of the property bequeathed; and third, the persons to whom it is bequeathed. The testator was beyond all doubt a British subject.

(a) 5 Myl. & Keen, 365, and 2 Myl. & Cr. 256.

(b) 2 Crom. & Jerv. 426.

(c) 5 Madd. 379.

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Can a British subject so put off his allegiance as not to be amenable to the laws of this country whether fiscal or not? The precise question never has been raised before.

Though the word "domicil" is used, by a sort of analogy, with reference to a British subject, it has no meaning when applied to a British subject. It is not to be found in any of our text writers or in any of our abridgments of the law. We find it in the law of nations, but with reference only to a foreigner dying in this country and having funds in this country.

With *regard to a British subject, you may inquire [*26] whether he was resident in England, in Ireland, or in India; in order to ascertain whether his property is subject to the English or the Irish rate of duty, or to no duty at all: for a British subject may change his liability to the duty, by going to reside in different parts of the queen's dominions: but he cannot get rid of his liability altogether, by going to reside in a foreign country. If a British subject makes a will with regard to British objects, and appoints British executors, his property is liable to legacy duty; and the only question that can be raised, is with respect to what part of her Majesty's dominions he is to be considered a British subject. If he went abroad and died there, he would be referred to that part of the queen's dominions in which he last resided. We admit that, if the testator had been a Frenchman, no duty would have been payable on his property: but that was not the case. He was a British subject; and the claim which his executor made to be compensated in respect of his property which had been confiscated, was founded on his having been a British subject. Had he been a French citizen, no such claim could have been made; for the funds set apart by the French government, were provided for the purpose of satisfying the claims of British subjects only.

In 1791, the testator quitted France, and came, with his family, to reside in this country; and he continued to reside there for more than ten years. Suppose that he had died in London after he had made his first will, could it have been contended that his domicil was to be referred to the country which he had aban-

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doned for more than ten years? It was said that, when he returned to France in 1802, he intended to fix his residence [*27] there: but there is no evidence of such intention. *The second will shows that the testator considered himself as purely a British subject; for he describes himself as James Fanning, (not Comte de Fanning,) a native of the city of Waterford; and states that he had gone to France, not permanently, but to endeavor to regain his property, and that too, on the ground of his being not a French but a British subject.

This then is the case of a British subject going to Paris for the purpose of making a claim upon the French government as a British subject, (that is, for a mere temporary purpose,) and accidentally dying in Paris before that purpose was completed, having made a will in London, with reference to British objects. *The Attorney-General v. Dunn.*(a)

Mr. Romilly:—In the case of *Hill v. Reardon*,(b) the particulars of the claims made by Devereux are fully stated; and it appears not only that those claims were made on the ground that the testator was a British subject, but that they could not have been made successfully on any other ground. Therefore, the testator must have abandoned his French domicile, and acquired a domicile in this country, which continued until his death.

In *Arnold v. Arnold*, the Lord Chancellor considered that the question was a mixed question of domicile and the *situs* of the property; and it was held that, though the testator was domiciled in India, the legacy duty was payable on that portion of his property which was in this country.(c) In the *Attorney-General v. Dunn*, the *foreign domicile of the testator [*28] was not established; but the barons of Exchequer, and

(a) 6 Mees. & Wels. 511.

(b) 2 Russ. 608.

(c) There are two reports of *Arnold v. Arnold*, one in 2 Myl. & Keen, 365, and the other in 2 Myl. & Cr. 256; but it does not appear, from either of them, that the testator's property in England, was decided to be subject to legacy duty.

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Mr. Baron Alderson in particular, seem to have thought that, even if it had been established, the legacy duty would have attached.

In this case the testator went to France in 1802, for a temporary purpose only, and with the intention of remaining there, not permanently, but only until he should have accomplished that purpose; and he died before he had accomplished it. No title to the sums awarded by the commissioners accrued until their award was made, which was many years after the testator's death. The money was afterwards remitted to and invested in the funds of this country, in order that it might be administered and the rights of the parties to it ascertained, in this country. It could not have been administered, nor could the rights of the parties to it have been ascertained in France, or anywhere but in England. The *situs* of the property, therefore, was clearly in this country; and the testator was domiciled in this country; the executors and legatees named in his will, were all of them British subjects; and all the objects of his will were British objects.

June 30th.—THE VICE-CHANCELLOR:—I have read over the affidavit in support of the petition, which is not contradicted. It not only states, generally, that Mr. Fanning was a domiciled Frenchman; but adds a great variety of particulars in detail, from which it appears to me that conclusion is unavoidable.

In my opinion the question, whether Mr. Fanning's property is liable to legacy duty or not, is concluded *In the Matter of Bruce*. In that case it did not appear very clearly, whether the testator was a *British subject or not. His father [*29] was a Scotchman; and he, himself, was born in Maryland; and, at the time of his death, he was certainly domiciled in America. He had property in this country; his will was proved in this country; and there was a suit for the administration of his estate in this country. But, notwithstanding, it was held that legacy duty was not payable upon it. I observe that,

in giving judgment in that case, Mr. Baron Bayley says that the deceased was not a British subject. Now supposing that those words were meant to be taken literally as they stand, it is quite clear, from the case of *Logan v. Fairlie*, as decided by the Lords Commissioners, and from the case of *Arnold v. Arnold*, that if the deceased had been a British subject, that fact would have made no difference; for the question whether the legacy duty is payable or not, depends not on the fact to whom the deceased owed allegiance, but upon the fact where he had his domicile at the time of his death.

In this case, I must take it that Mr. Fanning was domiciled in France at his death. His will, too, was made in France; and (if it is at all material to notice the circumstance) the property with regard to which the question is raised by the petition was, in its origin, French property. For Mr. Fanning, at the time of his death, had a claim on the French government, to what is termed, in the English law, damages; but was denominated in the treaties and conventions between the crowns of France and Great Britain, compensation for the loss he had sustained by the confiscation of his property in France. And though it is perfectly true, that his title to the compensation arose out of the fact of his owing allegiance to the British crown; yet that does not appear to me at all to affect the question. The French government [*80] set apart, from the public funds of France, a certain portion of *rentes* (that is, stock) for the purpose of making compensation to all those individuals, being British subjects, whose property in France had been confiscated by the French revolutionary government. Mr. Fanning then, at his death, had a claim on the government of France; and some years after his death, certain sums of French stock were awarded to his executor, in satisfaction of that claim. Consequently, the sums so awarded were clearly French in their origin: and although they, subsequently, for the purpose of payment, assumed the form of stock in the English funds, I do not think that circumstance makes any difference.

We have then the following facts in this case: a foreign domi-

1842.—In the Matter of the Warwick and Leamington Railway Company.

oil, a foreign will, and a foreign property; and it appears to me to be perfectly plain that the legacy duty is not payable.

Order made according to the prayer of the petition.(a)

(a) See *The Attorney-General v. Fitzgerald*, post, 83.

IN THE MATTER OF THE WARWICK AND LEAMINGTON [31]
RAILWAY COMPANY.(b)

Payment of Money out of Court.—Practice.

1842: 25th June.

A., B. & C., being entitled to a sum of money in the bank, petitioned that it might be paid, not to themselves, but to their banker. An order was made according to the prayer.

A LARGE sum of money had been paid into the Bank of England, under the authority of the speaker's warrant, in compliance with the standing order of the House of Commons, which requires that a deposit of 10% per cent. on the capital of any proposed joint stock railway company, shall be made prior to the application to Parliament, for an act of incorporation; and the money was placed in the bank, in the names of several persons who had been the principal projectors of the undertaking.

The act of Parliament having been now obtained, a petition was presented by all the persons in whose names the money was standing, praying that the amount might be paid to Mr. George Carr Glyn, of the city of London, banker, who was the banker to the railway company.

The VICE-CHANCELLOR made an order according to the prayer of the petition. The Registrar, however, on being applied to, to draw up the order, was of opinion that it was irregular in di-

(b) *Ex relations.*

 1842.—Flight v. Camac.

recting the payment to be made to the agent of the petitioners, instead of to the petitioners themselves. But his Honor, on his attention being called to the point by Mr. *Mylne*, the petitioners' counsel, said, that there was nothing irregular or improper in making the order as prayed.

[*32]

*FLIGHT v. CAMAC.

New Orders of August, 1841.—Practice.—Pro confesso.—Debt.

1842: 26th June.

A subpoena served, under the foreign process act, on a defendant resident abroad, is duly served within the 8th general order of August, 1841; and, if he does not appear, the plaintiff may cause an appearance to be entered for him, and proceed to take the bill *pro confesso*.

UNDER the 4th & 5th Will. IV, c. 82, (authorizing the process of the Courts of Chancery and Exchequer, to be served on defendants resident out of the United Kingdom,) the defendant, Camac, had been served with a subpoena to appear and answer at Calais; but without effect. Whereupon, the plaintiff caused an appearance to be entered for him, under the 8th general order of August, 1841; which directs: "that if the defendant, being *duly served* with a subpoena to appear to and answer the bill, shall refuse or neglect to appear thereto, the plaintiff shall, *after the expiration of eight days* from such service, be at liberty to apply to the court for leave to enter an appearance for the defendant. And the court, being satisfied that the subpoena has been *duly served*, and that no appearance has been entered by the defendant, may give such leave accordingly; and that, thereupon, the plaintiff may cause an appearance to be entered for the defendant. And thereupon such further proceedings may be had in the cause as if the defendant had actually appeared."

The plaintiff afterwards proceeded to take the bill *pro confesso* against the defendant, and ultimately obtained an order for that purpose.

 1842.—*Livesey v. Livesey.*

The Registrar on being applied to, to draw up the order, doubted whether the defendant had been *duly served* with the subpoena, within the meaning of the general order, so as to authorize the plaintiff to enter an appearance for him.

*The Vice-Chancellor, however, on the point being [*33] submitted to him by Mr. *Stuart* and Mr. *Wood*, the plaintiff's counsel, decided in the affirmative, and directed the order to be drawn up.

LIVESEY v. LIVESEY.(a)

Will.—Construction.—Eldest Son.

1842: 24th and 28th June, and 15th July.

Testatrix gave to the eldest son of her daughter who should be living at her own decease, ten guineas, and added that she left him no larger sum, because he would have a handsome provision from the estate of her late husband and the estate of his own father, (who was still alive,) and she gave the residue of her property to all the children of her daughter, except the daughter's eldest son, or such of her sons as, by the death of an elder brother, should become an eldest son, equally to be divided amongst them when the youngest should attain twenty-one. The daughter's eldest son was provided for in the manner mentioned: but he died before the youngest child attained twenty-one, and the provision did not devolve upon the daughter's second son. Held, nevertheless, that the latter was excluded from participating in the residue.

JANE WORTHINGTON, widow, made her will, dated the 24th of April, 1805, and which was, in part, as follows:

"I give unto my daughter Eliza, the wife of Edmund Livesey, the sum of ten guineas; and, unto the eldest son of my said daughter and the said Edmund Livesey, *who shall be living at my decease*, ten guineas; and I leave my said daughter, and the eldest son of my said daughter Eliza and the said Edmund Livesey, who shall be living at my decease, no larger sums, because they have and will have a handsome provision from the estate of my late husband and the estate of the said Edmund

(a) Affirmed, see 4 Sim. 163.

1842.—*Livesey v. Livesey*.

Livesey. I give, devise and bequeath all the residue of my estates and effects, real and personal, unto my executors [*84] hereinafter named, their heirs, executors, &c., *upon trust that they or the survivor of them, his heirs, executors, &c., do and shall pay and divide the same in manner hereinafter mentioned, that is to say, one moiety or half part thereof unto and amongst all and every the children of my daughter Jane, who may hereafter be born, (she not having any at present,) their heirs, executors, &c., equally to be divided amongst them and the survivors or survivor of them, share and share alike, as tenants in common and not as joint tenants, when the youngest of such children shall arrive at the age of twenty-one years. Provided always, nevertheless, that, if any of such children shall then be dead leaving lawful issue, such issue shall take the share which his, her or their parent would have taken if living. Provided, also, that if my said daughter Jane shall not have any children, or such children shall all die under the age of twenty-one years without having lawful issue, then the aforesaid moiety to go to my said daughter Eliza's children, save and except her eldest son or him who, by the death of his elder brother, may become so, and the survivors or survivor of them and their, his or her issue, at such time and in such shares and manner as the other moiety of the aforesaid residue of my estate and effects is hereinafter directed to be paid and divided: and, as to the other moiety or half part of the said residue of my estates and effects, real and personal, upon trust that my said executors, or the survivor of them, his heirs, executors or administrators, do and shall pay and divide the same unto and amongst all and every the children of my daughter Eliza, who are now in being or shall hereafter be born, (save and except her eldest son or such of her sons as shall, by the death of an elder brother, become an eldest son, it being my will that the son who is or shall become an eldest son shall not be entitled to take anything under [*85] this devise or bequest,) their heirs, *executors, administrators and assigns, equally to be divided amongst them and the survivors or survivor of them, share and share alike, as tenants in common and not as joint tenants, *when the youngest of them shall arrive at the age of twenty-one years*. Provided always,

1842.—*Livesey v. Livesey*.

nevertheless, that if any such children shall then be dead leaving lawful issue, such issue shall take the share which his, her or their parent would have taken if living. Provided also, that if all such children shall die under the age of twenty-one years without leaving any issue living, the said last-mentioned moiety of the aforesaid residue, shall go to my daughter Jane's children, and the survivor or survivors of them, and their, his or her issue, at such time, and in such shares, and in such manner as the first mentioned moiety of the aforesaid residue is hereinbefore directed to be divided. Provided, also, that if all the children of my said daughters, except the eldest son of my daughter, Eliza, or him who shall, by the death of his elder brother, become an eldest son, shall die under the age of twenty-one years and not leave any issue living, then the whole of the said residue of my real and personal estate and effects to go to the eldest son of my said daughter Eliza, his heirs, executors, administrators and assigns. And I do hereby declare it to be my will and mind that, in case all the children of my daughter Eliza, except one who shall happen to be a daughter, shall die under the age of twenty-one years and without leaving lawful issue, such daughter shall be considered as an eldest son of my said daughter Eliza, and shall not take any part of the residue of my real or personal estate and effects, unless my said daughter Jane shall die without leaving any issue, and such issue shall all die under the age of twenty-one years. And it is my will and mind that, in the meantime and until the respective moieties of the aforesaid residue of my real *and personal estates [*36] shall be to be divided, the rents, interest and produce thereof shall accumulate and be added to the said moieties and become a part thereof, and the said accumulations shall be divided and paid, at the same time, unto and amongst the same person or persons, and in the same manner as the said moieties are hereinbefore directed. And I do hereby direct and empower my said executors to invest the residue of my estate and the accumulations thereof, either in the public funds or at interest upon real securities, as to them shall seem meet. Provided, nevertheless that if, at the time my said daughter Eliza shall arrive at the age of forty-eight years, or will, if living, arrive at that age,

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or at any time afterwards, there shall not be any issue of her or my daughter Jane living, or, being such issue, the same shall afterwards die under the age of twenty-one years, then it is my will and mind that my said executors or the survivor of them, his heirs, executors or administrators, do and shall pay the rents, interest, dividends and produce of the said residue of my said real and personal estates and of such accumulations thereto as aforesaid, which shall arise and grow due from the time when my said daughter Eliza shall attain her age of forty-eight years, or from the time when the last of such issue of my said daughters Jane and Eliza shall die, unto and between my said daughters Jane and Eliza, equally, share and share alike, during their joint lives, and to the survivor of them during her life; the aforesaid payments thereof to be made to each of my said daughters for her own use and benefit, and not subject to the debts, disposition, power or control of her husband, and for which her receipt shall be a sufficient discharge notwithstanding her coverture; it being my will that, in case of either of the contingencies in the last mentioned proviso, the rents, in-
[*37] terest, dividends *and produce of my estate shall not afterwards, during the lives of my said daughters or the life of the survivor of them, accumulate for the benefit of those who will be entitled to the residue of my estates. Provided, also, that in case all the children of my said daughters now living, or which may hereafter be born, shall happen to die before the younger of them shall attain the age of twenty-one years and without leaving lawful issue, then and in such case I do hereby give, devise and bequeath all the residue of my estates and effects, real and personal, with the accumulations aforesaid, from and after the decease of the survivor of my said daughters Jane and Eliza, and subject to the life estate and interest of my said daughters and the survivor of them therein as hereinbefore mentioned, unto my nephew, John Armstrong, and niece, Jane Armstrong, their heirs, executors, administrators and assigns, equally to be divided between them, share and share alike, as tenants in common and not as joint tenants. I nominate and appoint my daughter Jane Livesey, and William Clarke of Liverpool, aforesaid, banker, executors of this my will."

The testatrix died in June, 1815, leaving her two daughters Jane and Eliza, two of the defendants to the suit, her co-heirs, her surviving. Eliza had five children, namely, Edmund Worthington Livesey, who attained 21 in August, 1817, and died a bachelor in May, 1827, James Worthington Livesey, who was born in November, 1798, and was a party to the suit, another child who died, unmarried and under age, in 1820, Mary Carter Livesey, who was born in July, 1804, and Harding Livesey, who was born in September, 1809. Jane Livesey had two children: one born in 1805, and the other, in 1811.

*A petition presented in the cause, by Mary Carter [*38] Livesey and Harding Livesey, stated that Harding Livesey, the youngest child of Eliza Livesey, attained 21 in September, 1830: that Edmund Worthington Livesey died before Harding Livesey attained 21; and that, by his death, James Worthington Livesey became the eldest son of Eliza Livesey; and, in consequence of his becoming such eldest son before the moiety of the testatrix's residuary estate bequeathed in trust for the children of Eliza Livesey except her eldest son, became vested and divisible, he was excluded from taking any share of that moiety, and the whole thereof became divisible between the petitioners in equal moieties: and the petition prayed for a declaration to that effect.

It appeared, from an affidavit in support of the petition, that Edmund Worthington Livesey, under the will of his grandfather, the testatrix's late husband, was entitled to an annuity of 200*l.* during his life, and to a sum of 4,000*l.*; and that, under the will of his father, Edmund Livesey, as it stood at the date of the testatrix's will, he was tenant for life of his father's real estates, with remainder to his first and other sons, successively, in tail, with remainder to his daughters as tenants in common in tail, with remainders to James Worthington Livesey, and to his sons and daughters in like manner. The father, however, afterwards altered his will, and on his death in 1816, it appeared that his estates were limited, so that, immediately on the death of Edmund Worthington Livesey without issue, they

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vested in Mary Carter Livesey to the exclusion of James W. Livesey, and, on her dying without issue, in the father's own right heirs.

[*39] *Mr. *Anderdon* and Mr. *Stinton*, in support of the petition, relied on *Peacocke v. Pares*.(a)

Mr. *Dixon* and Mr. *Rolt* for James Worthington Livesey, said that, according to the true construction of the will, the children of Eliza Livesey who were to participate in one moiety of the testatrix's estate, were those who should be living when the youngest attained 21; but that the child of Eliza Livesey, who was to be excluded from participating in a moiety of the testatrix's estate, was (and, indeed, the testatrix had said so, in express terms, at the commencement of her will) the eldest son who should be living at her decease; that is, that the child who was to take the legacy of ten guineas, should be the excluded child: that James W. Livesey was not the child who was to take the legacy; for he was not the eldest son of Edmund and Eliza who was living at the testatrix's death: nor did the motive or reason for the exclusion, which the testatrix had expressed, apply to him; for he was not provided for either out of the estate of his grandfather or of his father; and, as the motive for the exclusion failed, the exclusion must fail also: that the shares of the children vested at the death of the testatrix, but were not to be paid over to them until the youngest child attained 21; and that the time of vesting was the proper time for ascertaining which of the children were intended to take: that there was more ground for excluding Mary Carter Livesey, than there was for excluding James W. Livesey, as Mary Carter Livesey was the child for whom provision was made from the estate of Edmund Livesey; *Lord Teynham v. Webb*; (b) *Duke v. Doidge*.(c)

[*40] *15th July.—THE VICE-CHANCELLOR:—In this case the testatrix, Jane Worthington, made her will, in the

(a) 2 Keen, 689.

(c) *Ibid*, 203, note.

(b) 2 Ves. 198.

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year 1805, by which she gave to her daughter Eliza, the wife of Edmund Livesey, the sum of ten guineas, and to the eldest son of her said daughter and the said Edmund Livesey who should be living at her decease, ten guineas. Then she says: "and I leave my said daughter, and the eldest son of my said daughter Eliza and the said Edmund Livesey, who shall be living at my decease, no larger sums, because they have and will have a handsome provision from the estate of my late husband, and the estate of the said Edmund Livesey." In order to explain that sentence, two affidavits have been made. Mr. Gustard's affidavit (which is the only one that throws any light on the subject) states that, at the time when the testatrix made her will, the eldest son, *de facto*, that is to say, Edmund Worthington Livesey, was entitled to an annuity of 200*l.* during his life, and to a sum of 4,000*l.* under the will of his grandfather; and that his father had made a will by which (if it remained unaltered) his estates would, in case Edmund Worthington Livesey died without issue, devolve on James Worthington Livesey. But then it is to be observed that there is nothing to show that the whole of the provision which was made for Edmund Worthington Livesey was to devolve upon James Worthington Livesey. The testatrix might have misunderstood the matter; but that is not the only observation that arises on this case.

The testatrix then gives one moiety of her real and personal estate, unto and amongst all and every the children of her daughter Jane, who might thereafter be born, (she not having any at the time,) their heirs, executors, administrators and assigns, equally to be *divided amongst them and the survivors or survivor of them, share and share alike, as tenants in common and not as joint tenants, when the youngest of such children should arrive at the age of 21 years. Then she says that if Jane should not have any children, or such children should all die under the age of 21 and without leaving lawful issue, the aforesaid moiety should go to her daughter Eliza's children (save and except her elder son, or him who, by the death of his elder brother, might become so) and the survivors or survivor of them, and their, his or her issue, at such times, and

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in such shares and manner, as the other moiety of the aforesaid residue of her estate and effects was thereafter directed to be paid and divided. Then she says: "And, as to the other moiety, upon trust that my executors, &c., shall pay and divide the same unto and amongst all and every the children of my daughter Eliza, who are now in being, or who shall hereafter be born, save and except her eldest son or such of her sons as shall, by the death of an elder brother, become an eldest son." And here it is to be observed that the objects of this trust were not only the children which Eliza might have by Edmund Livesey, but also the children she might have by any after-taken husband; and, if all the children she had by Edmund Livesey died under the age of 21, then the children she might have by her second husband were to be the sole objects of the trust. So that whatever the testatrix might have had in her mind, in the beginning of her will, with respect to the bequest of ten guineas, it is obvious that she here took a more extended view of the case. This moiety was to be divided amongst Eliza's children when the youngest of them should arrive at the age of 21 years. The testatrix then says: "Provided always nevertheless that if any of such children shall then be dead leaving lawful issue, such issue [*42] *shall take the share which his, her or their parent would have taken if living."

Now the time when this taking by substitution is to take place is sufficiently pointed out to be the death of the mother Eliza.^(a) Then follows a proviso in these words: "That if all the children of my said daughters, except the eldest son of my daughter Eliza, or him who shall, by the death of his elder brother, become an eldest son, shall die under the age of 21 years, and not leave any issue living, then the whole of the said residue of my real and personal estate and effects to go to the eldest son of my said daughter Eliza." This is in the most general form.

The testatrix then says: "And I do hereby declare it to be my will and mind, that in case all the children of my daughter

(a) It is submitted that the taking by substitution was to take place, not at the death of the mother, but when her youngest child attained twenty-one.

1842.—*Livesey v. Livesey*.

Eliza, except one who shall happen to be a daughter, shall die under the age of 21 years, and without leaving lawful issue, such daughter shall be considered as an eldest son of my said daughter Eliza, and shall not take any part of the residue of my real or personal estate and effects, unless my said daughter Jane, shall die" (and here follows a most remarkable expression) "without leaving any issue, and such issue shall all die under the age of 21 years"—a most strange expression it is. But here there is, for no reason whatever apparent on the will, (except a mere capricious determination of the testatrix herself,) an exception of a child who should happen to be the eldest (only *qu.*) daughter; which tallies with nothing at all that appears on the face of the will.

*At the time when the matter was discussed, I was very [*48] much struck with this particular clause; and it struck me so much that I did not choose to venture to give an opinion, without a careful consideration of the instrument. I have thought of it repeatedly, and have read over the instrument several times; and it so evidently consists of a mere collection of capricious devices, that I am not at all sure what it was the testatrix had in her mind, or what was her reason for excepting certain of the children of her daughter. The will affords no clue for discovering the motive which induced the testatrix to except an eldest (only *qu.*) daughter as well as an eldest son.

It seems to me that the case is distinguishable from all the cases that were cited, in this respect, namely, that it was perfectly uncertain what ultimately would be the will of the father. The will of the grandfather was known: but no provision was thereby made for the second son. The will of the father was, from its own nature, an instrument which might be revoked or altered. And we can hardly suppose if, in consequence of the bad conduct of the second son or for any other good reason, the father had thought proper to give the second son no provision, that it was the intention of the grandmother to counteract the judgment of the father and the disposition which he had made of his property by a second will.

 1842.—*Halford v. Gillow*.

In my opinion, this case is more like *Matthews v. Paul*,^(a) than any other case; but it stands on its own foundation; and the only safe way of deciding as to the effect of the will, is to give [*44] to the words, as they stand, *their natural and literal meaning. It would be acting on a wild conjecture, to deprive the words of their plain and literal meaning.

On these grounds, my opinion is, that James Worthington Livesey is not entitled to participate, with his surviving brother and sister, in that moiety of the testatrix's residuary estate which is directed to be divided amongst the children of the testatrix's daughter Eliza, except her eldest son, or such of her sons as should, by the death of an elder brother, become an eldest son.^(b)

(a) 3 Swanst. 328.

(a) James W. Livesey appealed, to the Lord Chancellor, from the decision of the Vice-Chancellor. The appeal has been argued, and now stands for judgment. The decision in this case was affirmed on appeal. 14 Simons, 163.

HALFORD v. GILLOW.

Bankruptcy.—Jurisdiction.—Injunction.

1842: 7th and 8th July.

Bill by a *cestui que trust*, against the assignees of the trustee, who had become bankrupt, for an account and payment of what was due in respect of a breach of trust committed by the bankrupt, and to restrain the assignees from distributing his estate amongst his creditors. The court refused the injunction; because it had no jurisdiction to interfere with the administration of a bankrupt's estate at the suit of a person claiming as a general creditor.

The court of bankruptcy has exclusive jurisdiction to deal with what is admitted to be the bankrupt's estate; but a court of equity or a court of law (as the case may be) has jurisdiction to determine what is or is not the property of the bankrupt.

In 1820 the plaintiff, who was then the widow of George Denne, Esq., married the defendant Halford. By the settlement on their marriage Messrs. Peckham and Snoulten, the trustees, were directed to receive the rents of certain real estates which

1842.—*Halford v. Gillow*.

the plaintiff was entitled to, *under her former husband's [*45] will, during the minority of Charlotte Denne, her only child, and to invest a certain portion of the rents, yearly, in the funds, and to accumulate the dividends until Miss Denne should attain 21, and, out of the surplus of the rents, to effect and keep on foot policies of assurance to the amount of 20,000*l.*, on the plaintiff's life: and, on Miss Denne attaining 21, the trustees were to stand possessed of the accumulated fund in trust for Mrs. Halford for her life, for her separate use, without power of anticipation, and, after her decease, for Mr. Halford: and they were to stand possessed of the moneys to be received under the policies, in trust for Mr. Halford.

The trustees, in breach of their trust, permitted Mr. Halford to receive the rents and to apply them to his own use, until 1836, when Miss Denne attained 21. Mr. Halford, however, effected the policies of insurance, but in his own name; and, in 1827, he assigned them to the trustees, upon trust, in the first place, to indemnify themselves against the consequences of their breach of trust, and, in the next place, to make good the investment and accumulation directed by the settlement, and, lastly, in trust for Mr. Halford, his executors, &c. In February, 1834, the defendant Peckham, one of the trustees of the settlement, retired from the trusts, and Mr. and Mrs. Halford, in pursuance of a power in the settlement, appointed the defendant Jenkins, a trustee in his place.

Mr. Halford carried on the banking business in co-partnership with Mr. Snoulten and others; and in October, 1841, the firm became bankrupt. The trustees had claimed to prove, as separate creditors of Mr. *Halford, the sum which [*46] they computed the fund directed to be accumulated would have amounted to, if the trusts of the settlement had been duly performed; but the commissioners refused to allow more than a claim to be entered in respect of it.

The bill, which was filed against the assignees, the trustees of the settlement, and Mr. Halford, alleged that all the separate

 1842.—*Halford v. Gillow*.

creditors of Mr. Snoulten who had proved their debts, had been paid, in full out of his separate estate, and that the assignees threatened to apply the surplus of his separate estate (which was very large) in payment of the joint debts of the bankrupts. The prayer sought to charge the trustees for their breach of trust; to have the policies sold and the proceeds applied, as far as they would extend, in making good what the master should find the investment and accumulation directed by the settlement, would have amounted to if the same had been duly made; that the trustees, or one of them, might be ordered to prove the deficiency against Snoulten's separate estate; that, if the trustees should establish their claim against Halford's separate estate, they might be ordered to pay the dividends which they should receive from it into court, in order that the same might be applied towards making good the amount to be found by the master as before mentioned; that they might be ordered to dispose, in like manner of the dividends which they should receive from Snoulten's separate estate; and that the assignees might be restrained from taking any proceeding in the bankruptcy or otherwise, in order to the making or declaring of any further dividend of Snoulten's separate estate, and from paying, distributing [*47] or parting with such separate estate or any *part thereof, to or among any of the creditors who had proved or should prove debts under the bankruptcy, or otherwise.

Mr. *G. Richards* and Mr. *Lloyd* now moved for the injunction: they said that it could not be disputed that the trustees of Mr. and Mrs. Halford's marriage settlement, had been guilty of a breach of trust; and that the only question was whether a court of equity had jurisdiction to grant the relief sought by Mrs. Halford, the *cestui que trust*, or whether she must apply to the Court of Review; that, in *Thompson v. Derham*,^(a) this court refused to assist the plaintiff, (who sought relief in respect of a breach of trust which had been committed by bankrupts,) not on the ground of want of jurisdiction, but because the plaintiff had applied to the Court of Review and had failed there: but, in the present

(a) 1 Hare, 353.

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case, the plaintiff had made no application to the Court of Review, with respect to Snoulten's separate estate: that she had no power to compel the trustees to apply to the Court of Review; and, moreover, they were not subject to the bankrupt laws; and, therefore, the commissioners acting under the *fiat*, could not compel them to sell the policies of insurance: that, as a breach of trust had been committed, this court clearly had jurisdiction; and it was a principle of the court, not to compel a plaintiff to split his demands: that the relief asked could not be granted, nor could the equities of the different parties, be worked out, except in this court: that the amount to be proved against Snoulten's separate estate, on account of the breach of trust, could not be ascertained until this suit was wound *up [*48] and that, at all events, the court would interfere to prevent his estate from being distributed amongst the joint creditors of the bankrupts, until the amount to be proved had been ascertained. *Glascott v. Lang*,(a) *Bromley v. Goodere*,(b) *Hankey v. Garret*,(c) *Treves v. Townshend*,(d) *Anon.*,(e) *Clarke v. Capron*,(f) *Ex parte Garland*,(g) *Atkinson v. Plummer*.(h).

Mr. *Bethell* and Mr. *Ellison* for the assignees of *Halford & Co.*, said that a court of equity had no jurisdiction in the present case; but that either Mrs. *Halford* or Mr. *Jenkins*, the solvent trustee, must apply to the commissioners, to ascertain the amount of their demand, and, in the meantime, to have a claim in respect of it, entered on the proceedings in the bankruptcy; 1 *Cooke Bank. Laws*, 266; and that, if the commissioners refused the application, the only course was to appeal to the Court of Review: that the Court of Review might, perhaps, order a bill to be filed to establish the claim; but there was no case in which this court had interfered in the first instance: that the commissioners declared the dividends of a bankrupt's estate, and ordered the assignees to pay them; and there was no case in which this court had restrained assignees from doing that which the commission-

(a) 3 *Myl. & Cr.* 451.(b) 1 *Atk.* 75.(c) 1 *Ves. jun.* 263.(d) 1 *Bro. C. C.* 384.

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(e) 3 *Atk.* 350.(f) 2 *Ves. jun.* 666.(g) 10 *Ves.* 110.(h) *Eden on Injunctions*, 299. See *post*, p. 50.

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ers had ordered them to do : *Saxton v. Davis*, (a) *Ex parte Lowe*, (b) *Ex parte Keys*, (c) *Ex parte Stubbs*, (d) *Ex parte King*. (e)

[*49] *THE VICE-CHANCELLOR:—In my opinion the plaintiff has no interest whatever in the policies of insurance, unless she can effect an equity through the medium of the indemnity deed. Of course I am not now going to decide whether she has any interest or not ; but, unless she can work it out by means of an equity founded on the indemnity deed, she has not any interest whatever in the policies : for she certainly has no interest in them under the settlement in pursuance of which they were effected.

With respect to the fund which was to be formed, by investing a portion of the rents in the funds and accumulating the dividends, she unquestionably has an interest ; and I think that she may sustain a bill, in some respects, against the assignees. But the question is, whether, in a suit constituted as this is, I can interfere, by injunction, to prevent the assignees from making a dividend.

It is observable that the plaintiff's only claim against the surplus of the separate estate of Snoulten, is the general claim of a creditor. She does not claim any specific portion of that estate as being her property : and my opinion is that this court has no jurisdiction, *simpliciter*, to restrain assignees from making a dividend of that which is admitted to be the estate of the bankrupt. In making the dividend, the assignees act as officers of the Court in Bankruptcy ; which has lawful authority to declare the amount of the dividend, and when it shall be made.

If the question had been whether any assets, any personal estate, or any other species of property which was in the hands of the assignees as a part of Snoulten's *separate estate, was, in fact, the property of the plaintiff, this court, I apprehend, would decide the question ; because the jurisdiction

(a) 1 Rose, 79.

(d) 3 Deac. 549.

(b) 1 Deac. & Chitty, 30.

(e) 11 Ves. 417.

(c) 1 Mont. & Ayr. 226.

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in bankruptcy has authority to deal only with that which is the bankrupt's estate; but has no power to determine what is the bankrupt's estate. If the question be a legal one, it must be tried at law; and if it be an equitable one, it must be decided in this court. But when you have determined what is the property of the bankrupt, the whole administration of it falls under the jurisdiction of the Court in Bankruptcy.

None of the cases which were cited in support of the motion, show that this court has ever interfered to prevent the assignees from making a dividend of that which is, unquestionably, the bankrupt's estate; and, therefore, I shall refuse the motion; but as the case cited from Mr. Eden's Treatise on Injunctions, may have induced the plaintiff to make the motion, I shall refuse it without costs.

In *Atkinson v. Plummer*, the plaintiffs claimed to have an interest in two West India estates belonging to the bankrupts, under a conveyance made, many years before the bankruptcy, to persons whom the plaintiffs represented; which conveyance, though made to the plaintiffs without any trust being declared, had been agreed to be made to them, in trust to sell and to reimburse themselves, out of the proceeds, the sums which they had expended and should expend or advance on account of the estates. The bill alleged that the assignees had advertised a meeting of creditors, in order to declare a dividend of the joint estate of the bankrupts: that, if the dividends should be made before the *amount of the balance was ascertained, the [*51] plaintiffs would lose what was due to them, inasmuch as the estates in question were the principal fund from whence the assignees could make a dividend; and the plaintiffs were advised that the proceeds of those estates were primarily liable to pay the debts due, in respect of the estates, to the persons whom the plaintiffs represented.

The order made on the motion for an injunction to restrain the assignees from making the proposed dividend until the amount

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of the balance due to the defendants had been ascertained, was as follows: "His Lordship doth order that the defendants (the assignees) be at liberty to make the present dividend of one shilling in the pound under the commission of bankruptcy, of the estate and effects of the said bankrupts; but this is to be without prejudice. And it is ordered that the said defendants be restrained from making any future dividend of the produce of the Saxham and Caldwell estates (the estates in question) under the said commission, without the leave of this court."

Reg. Lib. A. 1810, fol. 1466.

[*52]

*MINTER v. WRAITH.

Will.—Construction.—"Personal Representatives."—"Issue."—*Remoteness.—Executory Limitation.*

1842: 13th July.

Testator directed his trustees to sell his real and personal estate, and to pay the interest of the proceeds to his daughter for life, and, after her death, to assign the principal and the parts of his real and personal estate remaining unsold (if any) to her children, when they should attain twenty-one; and, if his daughter should die without leaving issue, or leaving issue, all of them should die under twenty-one and without issue, then to assign the proceeds and the parts of his real and personal estate remaining unsold (if any) to his personal representatives, his, her or their heirs, executors, administrators and assigns. The daughter, who was the testator's next of kin, at his death, died without having had a child. Held, that by "issue," the testator meant "children;" and that the persons who were his next of kin at his daughter's death, were entitled under the ultimate trust.

If a limitation is made dependent on the happening of either of two events, one of which is too remote, but the other is not; it will take effect if the latter event happen.

ROBERT WRAITH, being seised of gavelkind lands, made his will, dated the 18th of November, 1808, in the following words: "First, I give, devise and bequeath unto my two brothers, William Wraith and Samuel Wraith, and my friend John Zachariah Plummer, their heirs, executors and administrators, all and every my messuages, lands, tenements, hereditaments and real estate

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whatsoever, and also all my household furniture, moneys, securities for money, goods, chattels and personal estate, upon trust that they, the said William Wraith, Samuel Wraith and J. Z. Plummer, shall and do, as soon as conveniently may be after my decease, sell, dispose of and convert into money my said real and personal estate, or such part or parts thereof as they may think proper; and, with the moneys arising from such sale or sales, or otherwise, out of my personal estate, I do hereby direct my said trustees, in the first place, to pay off and discharge all just debts due and owing from me at the time of my decease, my funeral expenses and the charges and expenses of proving this

*my will; and, after payment thereof, I do hereby direct [*58] my said trustees to lay out and invest the residue of such moneys, together with any other moneys coming to them by virtue of this my will, in the purchase of stock in some or one of the public funds of this kingdom, in their or his names or name; and upon trust that they, my said trustees, shall and do stand possessed of such moneys and the stocks and funds in which the same may be invested, together with such part or parts of my said real and personal estates as shall remain unsold, if any, in trust to pay unto or permit and suffer my dear wife, Jane, and her assigns, to receive and take all the interest and dividends and profits thereof, as the same shall become due and payable, for and during the term of her natural life; and, from and immediately after her decease, in trust to permit and suffer my daughter Sarah to receive and take all the interest and profits of one full moiety or equal half part of and in the said moneys, stocks and funds, and of and in the said part or parts of my said real and personal estates remaining unsold, if any, for and during the term of her natural life, free from the control and intermeddling of any husband with whom she may happen to marry; and, from and after her decease, to pay and divide the same unto and among all and every her *child and children*, share and share alike if more than one, when and as he, she or they shall attain the age of twenty-one years, and to pay and apply the annual produce thereof, in the meantime, for their maintenance, education and bringing up: and in case my said daughter shall happen to die without issue, or leaving issue, all of them shall die under

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the age of twenty-one years and without issue, then, in trust to convey and assign such moiety unto my *personal representatives*, his, her or their heirs, executors, administrators and as-
[*54] signs : and, as to the *other one full moiety or equal half part of and in the said moneys, stocks and funds, and of and in the said part or parts of my said real and personal estates remaining unsold, if any, in trust to pay unto or permit and suffer my daughter Jane, the wife of Josiah Robert White, to receive and take all the interest, dividends and profits thereof, as the same may become due and payable, for and during the term of her natural life ; whose receipt alone, notwithstanding her coverture, shall be a good and sufficient discharge to my said trustees for the same or any part thereof, and that free from the control, debts and intermeddling of her present or any future husband ; and, from and immediately after her decease, in trust for the use and benefit of the said Josiah Robert White, for his life ; and, after the decease of the survivor, in trust that my said trustees shall and do pay, assign, transfer and convey the said last mentioned moiety or half part of and in the said moneys, stocks and funds, and of and in the said part or parts of my said real or personal estates remaining unsold, if any, unto and to the use of all and every the child and children of her my said daughter Jane, share and share alike, if more than one, when and as he, she or they shall respectively attain the age of twenty-one years, and to pay and apply and dispose of the interest, dividends and produce thereof, in the meantime, for and towards their respective maintenance and education and bringing up : and, in case my said daughter shall happen to die without leaving issue lawfully begotten, or leaving issue, all of them shall happen to die under the age of twenty-one years, and without issue, then in trust to pay, assign, transfer and convey the said last mentioned moiety or half part of and in the said moneys, stocks and funds, and of and in the said part or parts of my said real and personal estates remaining unsold, if any, unto my personal repre-
[*55] sentatives, *his, her or their heirs, executors, administrators and assigns. Provided, and I do hereby declare my will and mind to be that it shall and may be lawful, to and for my said trustees, to retain and keep, in their hands or possession,

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the part and share of and in the said moneys, stocks and funds, and of and in the said part or parts of my said real or personal estates remaining unsold, if any, hereinbefore directed to be assigned and conveyed unto my said daughter Sarah, during so long time as she, my said daughter, shall continue to labor under her present affliction, or so long as they shall, in their discretion, think fit and proper, paying and applying the interest, dividends and profits thereof as the same shall become due and payable, in the meantime, to and for her use and benefit. Provided always, and I do hereby expressly declare my will and mind to be that, in the event of either of my daughters dying before the other without leaving children, the surviving daughter shall hold and enjoy my deceased daughter's share in my real and personal estate, in such and the same manner, and subject to the same uses and trusts as are hereinbefore mentioned concerning such daughter's moiety of and in my said real and personal estates. And I do hereby appoint the said William Wraith, Samuel Wraith and John Zachariah Plummer, executors of this my last will and testament."

The testator died on the 9th of April, 1811, leaving all the persons named in his will, him surviving.

Sarah Wraith, one of the testator's daughters, died intestate and unmarried in the lifetime of the testator's widow. The widow died in May, 1835. Jane White, the testator's other daughter, survived her husband, *Josiah Robert [*56] White, and died in December, 1836, without ever having had a child.

By her will, dated the 24th of October, 1836, she gave all such part, share, right and interest as she then had or might thereafter have of and in her late father's real and personal estate, and all other her real and personal estate, to her nephews, the defendants William Wraith, John Wraith and Samuel Wraith, who were the sons of the testator's eldest brother, Samuel, absolutely as tenants in common.

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William Wraith, one of the testator's brothers, died without leaving issue. Samuel Wraith, the testator's other brother, died in 1834, having survived J. Z. Plummer as well as his brother William, and having appointed his two sons John and William (who, together with their brother Samuel, were his co-heirs in gavelkind, and also the co-heirs in gavelkind of the testator) his executors.

Mary, the wife of William Minter, was the testator's only sister; she died in the testator's lifetime, leaving the plaintiff, her son, the only issue of her body.

The bill alleged that, in those clauses of the testator's will, in which he directed his trustees, in certain events which had happened, to convey and assign the two moieties of his real and personal estate unto his personal representatives, his, her or their heirs, executors, administrators and assigns, the testator, by the expression: "my personal representatives," meant his next of kin, and such only of them as should be living at the death of the survivor of his two daughters without issue; and [*57] that the defendants and the plaintiff were *the only next of kin of the testator who were living at the death of Jane White, and that, as such, they became entitled, upon her death, to have the whole of the testator's real and personal estate conveyed to them, their heirs, executors, &c., according to the directions of the will: but that the defendants alleged that the testator, by the expression before mentioned, meant his next of kin living at the time of his death; and that, in the events which had happened, Jane White became absolutely entitled, under the will of the testator, to the whole of his real and personal estate, and had full power to dispose thereof at the time of making her will.

The bill prayed that the testator's will might be established and the trusts of it performed under the direction of the court; and that the rights and interests of all persons under it, might be declared; and, more particularly, that it might be declared that, according to the right construction of the will, the next of

kin of the testator living at the death of Jane White without issue, became, upon her death, entitled, in the events which had happened, to the real and personal estate of the testator, and that the plaintiff, as one of such next of kin, was entitled to a share thereof.

The defendants put in a general demurrer.

Mr. *G. Richards* and Mr. *Goodeve*, in support of the demurrer, contended, first, that the testator, by the words: "my personal representatives," meant his next of kin; and that there was nothing, in his will, which showed that he meant his next of kin at any time subsequent to his death; and, consequently that, if the trusts on which the question arose were valid, Sarah *Wraith and Jane White, notwithstanding they were the [*58] parties on whose deaths without issue those trusts were to take effect, and notwithstanding they were the objects of the prior trusts, became entitled, in the events that had happened, to one moiety each of the trust property, and that, on Sarah Wraith dying intestate and unmarried, Jane White, as her next of kin, became entitled to her moiety of the trust property. (a) *Holloway v. Holloway*, (b) *Doe v. Lawson*, (c) *Elmsley v. Young*, (d) *Bird v. Wood*, (e) *Pearce v. Vincent*, (g) *Rayner v. Mowbray*, (h) *Masters v. Hooper*, (i) 1 Powell on Devises, Jarman's edition, 283, note: that, if the expression "my personal representatives," meant "my executors," then the plaintiff was not one of the objects of the trusts, for he was not one of the testator's executors.

Secondly, they contended that the trusts in question were void for remoteness, as they were to take effect after a general failure

(a) It did not appear that any one had taken out administration to Sarah Wraith.

(b) 5 Ves. 399.

(c) 3 East. 278.

(d) 2 Myl. & Keen, 82; see the judgment, p. 88.

(e) 2 Sim. & Stu. 400.

(g) 2 Keen, 230.

(h) 3 Bro. C. C. 234.

(i) 4 Bro. C. C. 207.

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of issue; and that, if the word "issue," where it first occurred, meant "children," that limited meaning could not be given to it where it subsequently occurred.

Mr. *Bethell* and Mr. *Ellison* in support of the bill, said that the trusts under consideration were, in their very terms, future, prospective trusts; that they were to take effect when the immediate objects of the testator's bounty should have ceased [*59] to exist, that is to say, *when his wife should be dead and both his daughters should have died without issue; and, as the testator had directed his trustees *then*, that is, on the happening of those future and uncertain events, to transfer the trust property to *his personal representatives*, that is, his next of kin, he must have meant by those words the person who should answer the description of his next of kin, at the time when those future and contingent events should happen; and that it was absurd to suppose that the testator could have meant that his trustees should transfer the property to his daughters, when they should be dead without issue.

They relied on *Clapton v. Bulmer*,^(a) as being precisely in point; and cited *Marsh v. Marsh*,^(b) *Jones v. Colbeck*,^(c) *Bryden v. Hewlett*,^(d) *Long v. Blackall*,^(e) *Butler v. Bushnell*.^(g)—[THE VICE-CHANCELLOR:—The trust is: "to convey and assign unto my personal representatives, *his*, her or their heirs, executors, administrators and assigns." How can the word "*his*," apply to the testator's daughters?]

Mr. *Bethell* and Mr. *Ellison* were proceeding to argue the question of remoteness; but were stopped by his Honor, who said that he was satisfied that the testator, by the word, "issue," meant "children."

Mr. *G. Richards*, in reply, said that the testator had used the word "*his*," because, when he made his will, he could not tell who would be his next of kin at his death: that they might

(a) 10 Sim. 426.

(b) 1 Bro. C. C. 293.

(c) 8 Ves. 38.

(d) 2 Myl. & Keen, 90.

(e) 3 Ves. 486.

(g) 3 Myl. & Keen, 232.

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have been his grandsons, or even he might have had sons. He relied on *Holloway* *v. *Holloway*, and read the observations on *Jones v. Colbeck*, in Mr. Jarman's edition of Powell on Devises, pp. 285, 286, note. [*60]

THE VICE-CHANCELLOR:—The real question in this case, is whether the words which give over the residue, entirely, in a given event, are to be taken as referring to the time of the testator's death or not. That is the sole point in the case: because, as I have already said, it appears to be plain, taking the whole words of the will together, that the word "issue," means children. —[Mr. *Richards*:—Does your Honor think that it has that meaning, where it lastly occurs?]

THE VICE-CHANCELLOR:—I think because the testator says: "In case my daughter shall happen to die without issue:" First of all he limits the property to her for life, and then to her children, "when and as he, she or they shall attain the age of twenty-one years. And, in case my said daughter shall happen to die without issue,(a) then in trust to convey." Now he had before limited the property to the children of the daughter after the death of their mother. Then he takes up the event that the daughter might happen to die, as he says, without issue. But it is plain that he did not mean without issue generally; because he goes on to say: "or, leaving issue, all of them shall die under the age of twenty-one years;" which contingency would be included in the prior one. If they all failed, there would be an end of the matter. Therefore, the words: "without issue," must mean without issue living at the death of the daughter. He had been speaking before of children; *and then he says: "or leaving issue, all of [*61] them shall die under the age of twenty-one years;" a very strange expression to be applied to issue indefinitely. That all the issue of an individual should die under the age of twenty-one years, appears to me to be a thing almost impossible to have entered into the mind of the testator, or indeed of any man.

• Nobody could contemplate so strange a contingency. Then, at

(a) The trust to convey was to take effect not only in case the daughter should die without issue, but also in case she should leave issue and all of them should die under twenty-one *without issue*. See *post*.

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the end of the will, he says: "I hereby express and declare my will and mind to be that, in the event of either of my daughters dying before the other *without leaving children*, the surviving daughter shall hold and enjoy my deceased daughter's share." Therefore it appears to me, that, taking the whole of the will together, the true meaning of the word "issue," must be taken to be "children."

Then, having removed that difficulty, we find that the testator has devised to three persons, their heirs, executors and administrators, all his real and personal estate, in trust to sell: so that there is no question but that they took absolutely the legal estate of inheritance. Then he directs his trustees to stand possessed of the moneys to be produced by the sale, on trust to pay the interest thereof to his wife for her life, and, after her death, to permit his daughter Sarah, to receive the interest of one moiety of those moneys, for her life, for her separate use; and after her decease, in trust to divide the capital amongst her children as they attain twenty-one; and in case his daughter should happen to die without issue, or leaving issue, all of them should die under the age of 21 years and without issue, then in trust to convey and assign such moiety to his personal representatives, his, her or their heirs, executors, administrators and assigns.

[*62] *Now, for the reasons which I have mentioned, I am of opinion that the words: "shall happen to die without issue," must mean: "shall happen to die without leaving children living at her death." And it has been decided in *Longhead v. Phelps*,^(a) that where there is a limitation to take effect in two events, one of which is too remote, and the other is within the limits and does take effect, the limitation over is good.

Then the testator says: "Then in trust to convey and assign such moiety unto my personal representatives, his, her or their heirs, executors, administrators and assigns:" and there is a limitation, not exactly in the same words, but very nearly in the same

(a) 2 Sir. W. Blackstone, 704.

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words, as to the moiety given to the daughter Jane. With respect to that moiety, the words are: "in trust to pay, assign, transfer and convey the said last mentioned moiety, or half part of and in the said moneys, stocks and funds, and of and in the said part or parts of my said real and personal estates remaining unsold (if any) unto my personal representatives, his, her or their heirs, executors, administrators and assigns." I must take the two clauses together; for one moiety is to be conveyed in the same manner as the other. Now here the testator considers it as doubtful whether any of his property would remain unsold or not. It is plain, therefore, that he is looking to an event which would be posterior to his own death. The expression is: "in trust to pay, assign, transfer and convey." All the previous terms are affected by grafting the direction in trust to pay, on the original devise, which had vested everything real and personal in the trustees: but here the direction is *one by [*63] means of which the trustees are altogether to denude themselves of trust; which is making them assume a very different situation from that which they were to stand in at the death of the testator.

Then the persons to whom the property is to be conveyed are described in a manner which is quite inconsistent with any notion, on the part of the testator, that his two daughters would be those persons. It is admitted on both sides, that the words: "personal representatives," must be held to mean: "next of kin." Now, at the time the testator made his will, he clearly contemplated that his daughters would survive him, and they would be his next of kin; and yet we find that the property is to be conveyed to his next of kin, his, her or their heirs, executors, administrators and assigns. Therefore the testator contemplated that the person or persons to take, might either be one male, one female, several males, several females, or several males and females: and that fivefold description is not applicable to the two daughters.

Then there is this further fact. The testator has directed by his will: "that it shall be lawful for the trustees to retain and

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keep in their hands, the part and share of, and in the said moneys, stocks and funds, and of and in the said part or parts of my said real or personal estates remaining unsold, (if any,) hereinbefore directed to be assigned and conveyed unto my said daughter Sarah, during so long time as she, my said daughter, shall continue to labor under her present affliction:" which is a direction that is applicable to that moiety of the property which is originally devised in trust for Sarah. But there is no [*64] direction as to what *shall be done with respect to the whole of the property, in case Sarah should become entitled to have the whole conveyed to her; in which case the trustees would denude themselves of the trust property altogether. And it rather seems to me to be a circumstance which tends to show that the testator did not contemplate that one of the persons to take under the conveyance, would be his daughter Sarah.

For these reasons I am of opinion that those persons who were the next of kin of the testator at the death of his daughter, Jane White, are the parties entitled under the trust for his personal representatives, his, her or their heirs, executors, administrators and assigns.(a)

Demurrer overruled without costs.

(a) By 7 WILL IV, and 1 Vict. c. 26, s. 29, the words "die without issue," or "die without leaving issue," or "have no issue," in wills made or republished on or after the 1st of January, 1838, are to be construed to mean, except in certain specified cases, a want or failure of issue in the lifetime or at the time of the death of the parent.

[*65]

*BRUCE v. CHARLTON.

Legacy.—Will.—Construction.

1842: 30th June.

Testator directed the rents of his estates to be accumulated for five years; "at the end of which time I leave as follows: to H. G. 200*l*.; and to W. B., W. C., E. M., or as many as are living, 100*l*. each; and to M. N., S. H., S. S., or as many as are then living, 50*l*. each; and the same sum to be given at the expiration of ten

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years from the time of my death, and ditto at the end of fifteen and twenty years from my death." Two of the legatees died between the end of the tenth and the fifteenth year after the testator's death, having received the payments which became due to them at the end of the fifth and tenth years. Held, that the rights of the legatees named in the will, to receive the payments, were contingent on their surviving the times of payment, and, consequently, that the executors of the then deceased legatees could not claim any payment at the end of the fifteenth year.

WILLIAM SMITH made his will, dated the 16th of February, 1824, and after giving certain pecuniary legacies and annuities, and directing the legacies to be paid within one year after his death, he proceeded as follows: "and when this is done my further will is that the rents and profits of my different estates produce may be duly collected and put into the Bank of England, in the names of my executors, to pay the yearly amounts of those mentioned in this my will, and the surplus to accumulate for five years: at the end of which time I leave as follows: to Henry William Godfrey, son of my adopted daughter, late Hill, and my godson, 200*l.*; and to my adopted daughter, late Hill, William Bruce, William Cain, Watkin Charlton, Edith Milward, Sophia Skey, Susan Smith, child of my late son William, brother Thomas, brother John, sister Mary, Ann Wood, or as many as are living, 100*l.* each: And to Mary Nott, Sarah Hutner, Susan Smith, Phoebe Johnson, William Wallace, Esther Harvey, Ann Leavers, William Grubb, Lavinia, late Williams, or as many as are then living, 50*l.* each: and the same sum to be given at the expiration of ten years from the time of my death, and ditto at fifteen and twenty years from *my [*66] death. After all the before mentioned is duly complied with, I give and bequeath as follows: that the few annuitants that may be then living may be made secure by a purchase in the bank from the money in the bank stock, or by any better means my executors may think best to adopt; and, at the end of the above twenty years, my will is that the whole may be sold and divided as follows: amongst the nephews and nieces of my brothers John and Thomas, and of my sisters Hannah and Mary, or as many as may be then living, share and share alike."

The testator died shortly after the date of his will. His bro-

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thers John and Thomas died between the tenth and the fifteenth year after his death. Each of them had been paid 100*l.* at the end of the fifth, and again at the end of the tenth year after the testator's death. The question raised by a petition in the cause, was whether their personal representatives were entitled to be paid the like sums at the end of the fifteenth year.

Mr. *Spence* appeared in support of the petition.

Mr. *Dixon* for the personal representatives of John and Thomas Smith, contended that all the legatees mentioned in the statement of the case, who were living at the death of the testator, or, at least such of them as were living at the expiration of the first five years after his death, took vested interests in the several sums which were directed to be paid to them at the four periods mentioned in the will; for the words: "or as many as *are* living," could not be held to have any application except to the first period of five years: that the bequests were, in effect, bequests of gross sums to be paid to each individual of the [*67] first class of legatees, *by instalments of 100*l.*, and of 50*l.*, to each individual of the second class, at the end of four successive periods of five years each; for the testator had said: "the same sum to be given at the expiration of ten years from the time of my death; and ditto at fifteen and twenty years from my death;" therefore, he must have meant the second payment to be made to the same persons as had received the first; and the third and fourth payments to be made to the same persons as had received the second: that, if the testator had repeated the names of the legatees after every direction to pay, there could have been no doubt upon the point; and, though he had not done so, he had done what was equivalent to it.

Mr. *Campbell* for the residuary legatees:—There is no gift, in any part of the will, except in the direction to pay. That observation applies, not only to the legacies, but also to the residue; and, on that ground alone, the legacies must be held to be contingent. *Smell v. Dee.*(a)

(a) 2 Salk. 415.

1842.—Bruce v. Charlton.

Again, in directing the first payment to be made to the legatees, and also in disposing of the residue, the testator has made it a condition precedent that the parties to take should be living at the time of payment; for, with respect to the former, he says: "or as many as are living;" and, with respect to the latter, he says: "or as many as may be then living." It may be further urged that the language of the will, throughout, implies similarity in all the gifts: and the construction which I am contending for, makes them consistent one with another. According to the argument for the *representatives of the deceased [*68] legatees, the first payment is contingent, but the subsequent payments are vested. But what reason is there for saying that the testator meant to give contingent legacies at the end of the first five years after his death, and vested legacies of the same amount and to the same persons, at the end of 10, 15 and 20 years after his death? The legitimate conclusion is that he meant every payment subsequent to the first, to be the same in quality (as it is in other respects) as the first. Indeed, it would be more reasonable to say that he intended the first payment to be vested and the subsequent payments to be contingent, than to maintain the converse of that proposition.

THE VICE-CHANCELLOR:—It is a well established rule, in the construing of wills, that, if a testator gives a legacy to A. B. at the end of 10 years after his death, the legacy is contingent; but if he gives it to A. B. *to be paid* to him at the end of the 10 years, it is vested.

Now, in this case, the testator directs the surplus of the rents of his different estates to be accumulated for five years; at the end of which time he leaves as follows: "to Henry W. Godfrey (son of my adopted daughter, late Hill, and my godson) 200*l*." It is clear, therefore, that, according to the rule of law which I have just referred to, H. W. Godfrey would not have been entitled to the 200*l* if he had died before the end of the five years during which the accumulation was to take place.

The testator then says: "to my adopted daughter, late Hill,"

1842.—Bruce v. Charlton.

William Bruce, William Cain, &c., &c., or as many as [*69] are living, 100% each." There he plainly *expresses that the payment is to be made to those only who shall be living at the time of payment.

Next he says: "And to Mary Nott, Sarah Hutner, Susan Smith, &c., &c., or as many as are then living, 50% each." It is quite clear that he there makes the right of the legatees to be paid their legacies depend upon their being *then* living.

The testator then continues as follows: "And the same sum to be given at the expiration of ten years from the time of my death, and ditto at fifteen and twenty years from my death." In my opinion that is nothing more than a concise repetition of what he had before said with regard to the legacies that were to be paid at the end of the first five years after his death. If that be so, the result will be the same, whether the words "then living," are taken as designating a class of legatees who are to take as such, or whether those words are taken as pointing to the time of payment: for, in either case, the individual legatees will not be entitled to the payments directed to be made at the end of the five, ten, fifteen and twenty years, unless they are living at each of those periods of time.

Moreover, the will is framed, throughout, on the same principle; I mean, with a view to make the right of the legatees to take under it, dependent upon their surviving the time at which they are to take. For the testator, when he proceeds to dispose of his residuary estate, says: "After all the before mentioned is duly complied with, I give and bequeath as follows: that the few annuitants that may be then living, may be made secure by a purchase, in the bank, from the money in the bank stock, [*70] or by any better means my executors may *think best to adopt; and, at the end of the above twenty years, my will is that the whole may be sold and divided as follows: amongst the nephews and nieces of my brothers John and Thomas, and of my sisters Hannah and Mary, or as many as may be then living, share and share alike." It is evident, therefore, that the testator's

 1842.—Chevaux v. Aislalie.

intention was that the pecuniary legatees named in his will, should not be entitled to any payment under it, unless they should be living at the time at which he had directed the payment to be made: and that the persons named as residuary legatees, should not be entitled to participate in his residuary estate, unless they should be living at the time appointed for dividing it: and if the testator had not expressed such an intention, the rule of law, which I alluded to at the commencement of my judgment, would have compelled me to come to the same conclusion.(a)

(a) See the next case.

*CHEVAUX v. AISLABIE.

[*71]

Will.—Construction.

1842: 8th July.

Testator bequeathed his residuary estate to trustees in trust, to pay the interest to his niece for life, and directed, that, after her death, the trustees should pay, apply, transfer and dispose of the residue amongst her children, equally to be divided between them, share and share alike, to be paid to sons at twenty-one, and, to daughters at that age or on their marriage: and he empowered the trustees, after his niece's decease or in her lifetime with her consent, to raise, pay and apply, for the preferment and advancement of any of her children, all or any part of their presumptive portions under the trusts aforesaid. Held, that there was no gift to the children, except in the direction to pay to them; and, therefore, their portions did not vest in them until such of them as were sons attained twenty-one, and such of them as were daughters either attained that age or married.

JAMES PATTY made his will, dated the 3d of August, 1816, and thereby disposed of his residuary personal estate in the following words:

“As to all the rest, residue and remainder of my moneys, securities for money, and all other my personal estate and effects, whatsoever and wheresoever, and of what nature or kind soever, I give and bequeath the same unto Benjamin Aislalie and Simon Tappy, their executors and administrators, upon trust that they, the said Benjamin Aislalie and Simon Tappy, and the survivor of them, and the executors or administrators of such survivor, do

1842.—Chevaux v. Aislable.

and shall convert the same into money, and lay out the money arising thereby, in their or his names or name, in the purchase of parliamentary stocks or public funds of Great Britain, or at interest upon government or real securities in England, and do and shall pay the interest, dividends and annual proceeds thereof unto my niece Jeanne Francoise Christiana Moynat, wife of Francois Auguste Moynat, now residing in Lavigny, in the Pays de Vaud, in Switzerland, for and during the term of her natural life, for her own use and benefit, and independent of her present [*72] or *any future husband with whom she may happen to marry; and, from and after the decease of my said niece Jeanne Francoise Christiana Moynat, I direct my said trustees to pay to her husband, the said Francois Auguste Moynat, in case he shall survive his said wife, during the term of his life, an annuity of 30%, clear of all deductions, by equal half-yearly payments; and, subject to the payment of the said annuity, I do hereby direct that my said trustees, or the survivor of them, his executors or administrators, shall *pay, apply, transfer and dispose* of the said residue of my estate between and amongst all and every the child and children of my said niece Jeanne Francoise Christiana Moynat, by the said Francois Auguste Moynat, her husband, equally to be divided between them, share and share alike, *to be paid* to sons at the age of 21 years, and to daughters at 21 years or days of marriage; and, if there shall be but one child of my said niece, who, being a son, shall attain the age of 21 years, or being a daughter, shall attain that age or be married, then in trust for such one child: and my will is, that it shall be lawful for my said trustees, or the survivor of them, his executors or administrators, after the decease of my said niece, or in her lifetime, with her consent signified by some writing under her hand, to levy and raise, and to pay and apply for the preferment and advancement of any of her children, all or any part of their, his or her *presumptive* portion under the trusts aforesaid, and, after the decease of my said niece, and during the minority of any child *presumptively* entitled to a provision under the trusts aforesaid, the said trustees or the survivor of them, or the executors or administrators of such survivor, shall apply the whole or a competent part of the annual produce of the stocks, funds, or se-

1842.—*Chevaux v. Aislabie*.

curities, or the part or share of the same to which such child shall be **presumptively* entitled, for his or her maintenance or education: and I hereby nominate, constitute and appoint the said Benjamin Aislabie and Simon Tappy executors of this my will." [*73]

The testator died shortly after the date of his will, leaving Mr. and Mrs. Moynat surviving. They had eight children, all of whom were living at the testator's death. In February, 1821, Christian Francois Moynat, one of those children, died an infant. Mr. Moynat died in 1827, and Mrs. Moynat in 1841.

At the hearing of the cause, which was instituted by the surviving children, (all of whom had attained twenty-one,) the questions were whether the plaintiffs became entitled, on their mother's death, to have *the whole* of the trust property divided amongst them, or whether the personal representatives of Christian Francois Moynat, were entitled to a share of it.

Mr. *Lewis*, for the plaintiffs, contended that the children of Mr. and Mrs. Moynat who were living at the testator's death, did not take vested interests in the trust fund, until, being sons, they attained twenty-one, or, being daughters, they attained that age or married; and that, if they took vested interests at the testator's death, their interests were liable to be divested on their dying under twenty-one, being sons, and under that age and unmarried, being daughters.

Mr. *Hingston* for the defendants, insisted that the trust fund vested absolutely in all the children who were living at the testator's death; and, consequently, that, on the decease of their mother, it became divisible, not into seven, but into eight shares, and that the *personal representatives of Chris- [*74] tian Francois Moynat were entitled to one share.

THE VICE-CHANCELLOR:—On the face of this will, there are no words of gift in the first instance, but only in the direction to pay; and the payment is directed to be made to sons at twenty-

 1842.—*Silvester v. Bradley.*

one, and to daughters at that age or on their marriage. The consequence is that only those children of Mr. and Mrs. Moynat who, being sons, attained twenty-one, or, being daughters, attained that age or married, took vested interests in the fund which now represents the testator's residuary estate: and, as Christian Francois Moynat died under twenty-one, he never became entitled to a share.

I observe that the maintenance clause speaks of the children as being entitled, presumptively only, to a provision under the trusts of the will, during their minorities.

[*75]

*SILVESTER v. BRADLEY.

Timber.—Perpetuity.—Title.—Vendor and Purchaser.—Will Construction.

1842: 12th July.

Testator devised his real estates to trustees in fee, in trust for T. M. for life, with remainder in trust for all the children of T. M., as tenants in common in tail, with remainders over, and, ultimately, in trust for his own right heirs: and he bequeathed his personal estate to the trustees, in trust for Mary B. for life, with remainder in trust for all her children, who should attain twenty-one, with remainders in trust for T. M., and his children in like manner: and he directed that the timber or wood which should be upon his real estates, should be, from time to time, made use of for repairing the houses thereon, or otherwise for the benefit and advantage of his estates; or that the same should be sold, and the proceeds applied in the manner in which his personal estate was thereinbefore directed to be applied. Held, that the direction or trust respecting the timber and wood on the estates, was not perpetual, but ceased on the inheritance vesting, in possession, in adult persons.

WILLIAM MARSHALL devised his estates in the counties of Kent and Northampton, unto and to the use of Charles Butler and James Winsbury, their heirs and assigns, upon trust, out of the rents, to pay an annuity of 70*l.* to his sister, Mary Borton, and her husband, Jonas Borton, during their lives and the life of the survivor of them, and, subject thereto, to stand seised of

1842.—*Silvester v. Bradley.*

the estates in trust for the testator's son, Thomas Marshall, during his life; and, after his decease, in trust for all the children of Thomas Marshall, equally, as tenants in common in tail, with cross remainders amongst them in tail, with remainder in trust for the testator's brother, Thomas Marshall, for life, with remainder in trust, out of the rents, to pay an annuity of 40*l.* to William Marshall, the eldest son of Thomas, the brother, for his life, and, subject thereto, in trust for Thomas, the younger son of Thomas, the brother, for life, with remainder in trust for all the children of Thomas the younger, as tenants in common in tail, with cross remainders amongst them in tail; with remainder in trust for Mary Borton for life, with remainder in trust for her children as tenants in common in tail, with cross remainders in tail; with remainder in trust for the testator's own right

*heirs: and the testator gave his residuary personal estate to the same trustees, in trust for his son Thomas, for life, and, after his decease, in trust for all the children of that son who should attain twenty-one, equally; but if his son should leave no such child, then in trust for Mary Borton for life, and after her death, in trust for all her children who should attain twenty-one; and, if she should have no such child, then in trust for the testator's brother, Thomas, for life, and, after his death, in trust for Thomas, the younger son of his brother, for life, and after his death, in trust for all the children of Thomas the younger, who should attain twenty-one; and if he should have no such child, then in trust for the testator's brother, Thomas, his executors, administrators and assigns. And the testator directed that the timber or wood which should be upon his real estates or any of them, should be, from time to time, made use of for repairing the houses thereupon, or otherwise for the benefit and advantage of his estates; or that the same should be sold, and the money arising from the sale thereof, should be applied in the manner in which his personal estate was thereinbefore directed to be applied. [*76]

The testator died in 1800. Thomas, his son, died in his lifetime without issue. Mr. and Mrs. Borton also died in the testator's lifetime, leaving nine children, all of whom attained twenty-one. The testator left his brother Thomas his heir-at-law, and

1842.—*Silvester v. Bradley.*

William and Thomas, the sons of his brother Thomas, him surviving; and after his death, Thomas, the brother, was let into the receipt of the rents of the estates. He died in 1816, leaving William, his eldest son, his heir, and Thomas, his younger son, him surviving.

Thomas the younger, was, thereupon, let into the receipt of the rents. He had several children, all of whom attained [*77] *twenty-one in his lifetime. He died in 1836. His brother William died in 1837.

In consequence of some of the children of Thomas Marshall the younger, having died leaving infant children, a private act of Parliament was obtained in 1839, by which the estates were vested in the plaintiffs, freed from the gifts, devises, bequests, uses, estates, limitations, &c., declared and contained in the will, in trust to sell. The act, however, contained a clause saving the rights of all persons then or thereafter claiming any interest in the timber or wood on the estates, or the produce thereof.

In 1840, the plaintiffs entered into a contract for the sale of part of the estates, *together with the timber and underwood thereon*. The purchaser having refused to complete his purchase, the bill in this cause was filed to compel a specific performance of the contract.

The purchaser alleged, as the ground for refusing to complete his purchase, that, as the trust in the testator's will with regard to the timber and wood on his estates, was not confined, in express terms, to any limited period, that trust operated, in equity, as a *perpetual severance of the timber and wood from the estates*; and that the persons entitled to his residuary personal estate, would be entitled, *in all perpetuity*, to so much of the timber and wood as should not be made use of, from time to time, for repairing the houses on the estates, or otherwise for the benefit and advantage of the estates, or to the moneys to arise from the sale thereof.

1842.—*Silvester v. Bradley*.

On the other hand, the vendors contended that the trust or direction as to the timber and wood on the estates, had *long since determined; but that, if the same was in- [*78] tended to continue forever, it was void in law.

Mr. Wakefield and Mr. Charles Hall for the vendors, cited *Butler v. Borton*.(a) They said that that case arose on the same will as the present case did; but that Thomas Marshall the younger, the tenant for life of the testator's estates, was then living; and the only question was, who was entitled to the timber on the estates, at that time; and that it appeared, or was to be inferred from the judgment in that case, that Sir John Leach, V. C., considered that the trust or direction in the will as to the timber on the estates, was not to operate any longer than during the life of the then tenant for life.

THE VICE-CHANCELLOR :—The facts of that case are not very clearly stated in the report, and therefore I must have the Registrar's Book produced.

It appeared, from the Registrar's Book, that the bill was filed by the trustees of the will against the children of Mr. and Mrs. Borton, and also against William and Thomas Marshall, the sons of Thomas Marshall, the testator's brother, and the children of Thomas, the son. It stated that, shortly after the testator's death, the trustees caused all the timber on the devised estates which was then fit to be felled, to be cut down and sold, and distributed the proceeds amongst the children of Mrs. Borton: that the children claimed to be entitled to *all the timber and underwood upon the estates which had *become fit to be felled since* [*79] *the testator's death*, and insisted that it ought to be felled and sold for their benefit: whereas Thomas Marshall the younger, and his children, insisted that the Bortons were only entitled to such timber as the plaintiffs had caused to be cut down as aforesaid, or to the moneys arising by the sale thereof. The bill further stated that the Bortons had recently entered on the es-

(a) 5 Madd. 40.

1842.—Silvester v. Bradley.

tates without the plaintiffs' permission, and had cut several timber trees thereon, and had carried away the same. The bill prayed that the will might be established, and the trusts of it performed, and that the rights and interests of all parties might be declared; and that an account might be taken of the timber felled by the Bortons, and that they might pay the amount of such part thereof as had been removed, into court: and that they might be restrained from removing or cutting down any of the timber remaining on the estates.

The Marshalls, in their answer, said that the distribution of the timber money amongst the Bortons, took place in 1808, and that their right and interest to any money to arise from the sale of timber on the estates, ceased on such distribution taking place; and they insisted that the Bortons had no right whatever to the *underwood* on the estates.

The decree was as follows:—This court doth declare that the timber and wood upon the real estates of the said testator, ought, from time to time, to be made use of for repairing the houses thereupon, or otherwise for the benefit and advantage of the testator's estates; and that what timber or wood shall, from [*80] *time to time, not be required for the purposes aforesaid, ought to be sold, and the moneys arising by the sale, ought to be applied in the manner directed by his said will. Refer it to the master to take an account of the timber and timber-like and other trees which have been fallen or cut down from off the said estates under or by means of the plaintiffs or the defendants, the Bortons, or any of them: and let the said master inquire whether such timber and timber-like trees or any part thereof, were wanted for repairing the houses on the estates, or otherwise for the benefit or advantage of the estates, and whether such timber or timber-like trees, or any part thereof, were so applied; and whether, at the time of cutting down any such timber or timber-like trees which were not applied in repairing the houses on the estates, or otherwise for the benefit or advantage thereof, there was sufficient left on the estates to repair the houses thereon from time to time, or otherwise for the benefit and ad-

1842.—*Silvester v. Bradley*.

vantage of the estates: And the said master is to inquire whether the same was proper to be cut in a due course of management; and whether there is any timber on the estates fit to be cut in a due course of management; and whether the same, or any part thereof, is wanted for repairing the houses upon the estates, or otherwise for the benefit or advantage of the estates: reserve further directions and costs, and any of the parties are to be at liberty to apply as they may be advised.

Reg. Lib. A. 1819, fol. 2583 b.

The VICE-CHANCELLOR, after perusing the decree, said that it did not contain any declaration as to the duration of the trust respecting the timber on the estates.

*Mr. *G. R. Richards* and Mr. *Faber*, for the defendant, [*81] the purchaser, cited *Stanley v. White*,^(a) and *Legh v. Heald*.^(b) and they read the following passage from *Liford's Case*.^(c) "If I, by deed, grant all my trees within my manor of G., to one and his heirs, the grantee shall have an inheritance in them without any livery and seisin." They said that the testator had separated the inheritance of the timber from the inheritance of his estates, as the authorities referred to showed he was at liberty to do; and that the objection on the ground of perpetuity, no more applied, than it would have done if he had devised a certain part of his estates to or in trust for the parties entitled to his personal estate. They added that, if the question was even a doubtful one, the court ought not to compel the purchaser to take the estate.

THE VICE-CHANCELLOR:—Though the case of *Butler v. Barton*, as reported by Mr. Maddock, does not represent the actual words of the decree, as entered in the Registrar's Book; yet it does not substantially fall short of them. It was only a decree with respect to the then existing circumstances; and it is plain that nothing was attempted to be dealt with, except the timber

(a) 14 East, 332.

(c) 1 Barn. & Adol. 622.

(b) 11 Rep. 49 b.

1842.—*Silvester v. Bradley*.

then cut and fit to be cut: therefore nothing was decided, in that case, which prevents me from saying, at a different time and under different circumstances, that the trust has altogether ceased.

Then consider what are the circumstances. All the tenants for life are dead; so that the trust estate of inheritance is [*82] vested in the children of Thomas Marshall, *the younger son of Thomas, the testator's brother, as tenants in common in tail. If that be so, they might file a bill against the trustees, to have the legal estate conveyed to them.

The clause respecting the application of the timber, could not be intended to operate after the death of the tenants for life. For it would be inconsistent, if not absurd, to say that a person should have the inheritance, and yet that there should be a perpetual trust to cut timber for the purpose of repairing the houses on the estate, for the owner of the inheritance. When the inheritance vested in possession of adult persons, the trust ceased.

I must say it is a very clear point, and that the purchaser may safely accept the title. Therefore I shall declare that the plaintiffs can make a good title; and the purchaser must pay the costs of the suit, unless some arrangement has been made respecting them.(a)

(a) Previous to the institution of the suit, Mr. Duval, Mr. Brodie, and some other eminent conveyancers were consulted as to the validity and duration of the trust respecting the timber on the estates. Mr. Duval, who advised on the title on behalf of the purchaser, said that it was difficult to decide as to the nature of the interests of the parties entitled: that it might be considered that, in equity, the inheritance of the timber was severed from the estate and vested in the persons who became entitled to the personal estate. The other learned gentlemen were of opinion either that the trust was void for remoteness (which it seems difficult to maintain, after the decree in *Buller v. Borton*, or that it ceased on the death of Thomas Marshall the younger.

 1843.—Attorney-General v. Fitzgerald.

***THE ATTORNEY-GENERAL v. FITZGERALD.—EX PARTE** [*83]
FITZGERALD AND OTHERS.

Legacy Duty.—Charity.—Stat. 55 Geo. III, c. 184.—Stamp Act.—Construction.

1843: 5th June.

Testator gave his residuary estate (which amounted to 13,000*l*) to his executors, to be by them appropriated to the education of the children of the poor in Ireland, principally those in or about Limerick. Held, that legacy duty as payable on the residue.

WILLIAM LEAMY, who died in March, 1815,(a) bequeathed his residuary estate and effects to his executors, to be by them appropriated to the education of the children of the poor in Ireland, principally those in or about the city of Limerick, or as they, his executors, should, in their better judgment, deem meet to give the bequest the most extensive efficacy.

The testator's residuary estate amounted to 13,387*l*. consols; and the court having approved of a scheme for applying that sum in the establishment and maintenance of a school, to be called "Leamy's Free School," for the education of the poor of Limerick and the neighborhood, and of all such other poor in Ireland, as might be willing to take advantage thereof, certain gentlemen residing in Ireland, who were named in the scheme as governors of the school, presented a petition, praying that the Accountant-General might be ordered to transfer the stock to them, *free of legacy duty*, for the purpose of being applied in carrying the scheme into effect.

The question was, whether the stock was subject to legacy duty or not. That question mainly depended on the following part of the schedule of duties imposed by the Stamp act, 55 Geo. III, c. 184: "For every legacy, *specific or pecuniary, [*84] or of any other description, of the amount or value of

(a) It did not appear, from the petition, where the testator was domiciled at his death.

20*l.* or upwards, given by any will or testamentary instrument of any person who shall have died after the 5th of April, 1805, either out of his or her personal or movable estate, or out of or charged upon his or her real or heritable estate, or out of any moneys to arise by the sale, mortgage, or other disposition of his or her real or heritable estate, or any part thereof, and which shall be paid, delivered, retained, satisfied or discharged after the 31st of August, 1815: and also for the clear residue, (when devolving to one person,) and for every share of the clear residue (when devolving to two or more persons) of the personal or movable estate of any person who shall have died after the 5th of April, 1805, (after deducting debts, funeral expenses, legacies and other charges first payable thereout,) whether the title to such residue or any share thereof shall accrue by virtue of any testamentary disposition, or upon a partial or total intestacy, where such residue or share of residue shall be of the amount or value of 20*l.* or upwards, and where the same shall be paid, delivered, retained, satisfied or discharged after the 31st of August, 1815, (a per centage increasing with remoteness of consanguinity :) and where any such legacy or residue, or any share of such residue, shall have been given or have devolved to or for the benefit of any person in any other degree of collateral consanguinity (than is in the act before mentioned) to the deceased, or to or for the benefit of *any stranger in blood to the deceased*, 10*l.* per cent."

As the 8th section of the act enacts that all the powers and provisions, clauses, &c., contained in former stamp acts, should extend to the duties granted by that act, the following sections of 36th Geo. III, c. 52, were referred to in the judgment:

[*85] *The sixth section enacts:—"That the duties hereby imposed shall, in all cases in which it is not hereby otherwise provided, be accounted for, answered and paid by the person or persons having or taking the burden of the execution of the will or other testamentary instrument, or the administration of the personal estate of any person deceased, upon retainer, for his, her or their own benefit, or for the benefit of any other person or persons, of any legacy, or any part of any legacy, or

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1843.—Attorney-General v. Fitzgerald.

of the residue of any personal estate, or any part of such residue, which he, she or they shall be entitled so to retain, either in his, her or their own right, or in the right or for the benefit of any other person or persons; and also upon delivery, payment, or other satisfaction or discharge whatsoever of any legacy, or of the residue of any personal estate, or of any part of such residue to which any other person or persons shall be entitled."

The eleventh section enacts:—"That if any benefit shall be given, by any will or testamentary instrument, in such terms that the amount or value can only be ascertained, from time to time, by the actual application for that purpose of the fund allotted for such purpose, or made chargeable therewith; or if the amount or value of any benefit given by any will or testamentary instrument, cannot, by reason of the form and manner of the gift, be so ascertained that the duty can be charged thereon under any other of the directions herein contained; then, and in every such case, such duty shall be charged on the several sums of money or effects which shall be applied, from time to time, for the purposes directed by such will or testamentary instrument, as separate and distinct legacies or bequests, and shall be paid out of the fund applicable for such purposes, or charged with answering the same."

*Mr. Cooper and Mr. C. Ellis for the petitioners:—Your [*86] Honor decided, *In the Matter of Francklin's Charity*,^(a) (a case nearly resembling the present,) that the legacy duty did attach. In that case a perpetual annuity of 50*l.* was bequeathed to the poor of a parish in Buckinghamshire, to be laid out in bread, and distributed, by the minister and churchwardens, to the most needy objects in the parish; and your Honor held that the legacy was liable to duty, although the poor were so numerous that no one received more than the value of 2*s.* per annum. In *Ex parte Wilkinson*,^(b) the testator directed his residuary

(a) *Ante*, Vol. III, p. 147; *S. C.*, 3 Youn. & Jerv. 544.

(b) 1 Crompt., Mees. & Roscoe, 142. Mr. Cooper read the arguments and judgment in the case cited, at considerable length; and also the judgment of the Court of Exchequer Chamber, affirming the decision of the Court of Exchequer. Reported *nom. Attorney-General v. Nash*, 1 Mees. & Welsby, 237.

1843.—Attorney-General v. Fitzgerald.

estate to be laid in the funds and the dividends to be divided, by his executors, amongst poor pious persons, male or female, in sums of 10*l.* or 15*l.*, as they should see fit; and the question, which was argued in the Court of Exchequer, was, whether the residue was liable to legacy duty. In the course of the argument, the case *In the Matter of Francklin's Charity* was cited and relied upon by the counsel for the crown. The learned barons, however, seem not to have entirely approved of the decision in that case; and, in the case before them, they held that, as the income of the fund was to be distributed in sums under 20*l.*, no legacy duty was payable. That case, therefore, seems to be at variance with the decision *In the Matter of Francklin's Charity*.—[THE VICE-CHANCELLOR:—The question now before me is purely a legal one; why, then, should it not be decided by a [*87] court of law?—All *parties will be satisfied with your Honor's decision.—[THE VICE-CHANCELLOR:—If the parties wish it, I will determine the question; but I shall not put myself in opposition to the court of law.]—If a legacy is given, for charitable purposes, to a corporation or to a society not incorporated, so that the application of the legacy is left entirely to the discretion of the corporation or society, there the duty must be paid; but if the disposition of the legacy is prescribed by the testator, and is such that no one of the objects of his bounty can receive a benefit from it to the amount of 20*l.*, or if it be doubtful whether the benefit will be to that amount, then the duty is not payable. Now, in this case, there is nothing to show what amount of benefit each of the poor scholars will receive. The gift is not made to any corporation or society already in existence, but the charity is *created* by the testator himself. If it appeared that the benefit to be derived by each of the poor children would amount to 20*l.*, then, according to the decision *In the Matter of Wilkinson*, the duty would become payable from time to time. In that case the amount of the fund was known, and the mode in which it was to be applied was pointed out by the testator himself; but, here, though the amount of the fund is known, it is impossible to say what amount of benefit each of the objects of the charity will derive from it. Consistently with what fell from the judges *In the Matter of Wilkinson*, the court cannot con-

sider the executors of the will in this case as the legatees; but it must consider the poor scholars (individually and not as a class) to be the legatees; and then, in all probability, no one of them will derive a benefit, from the bequest, to the amount of 20*l.*; and, if that be so, no legacy duty is payable.—[THE VICE-CHANCELLOR:—The poor scholars are not to have anything in the shape of money. A certain *quantity of [*88] education is to be purchased and infused into their minds; but there is to be no actual payment of money to them. The money must be considered as paid, *in solido*, for the purpose of creating the institution.]

Mr. *Glasse* appeared for the executors of the testator.

Mr. *Twiss* and Mr. *Romilly* appeared for the crown; but—

The VICE-CHANCELLOR, without hearing them, said:—There is a material distinction between the case *In the Matter of Franklin's Charity*, and the case *In the Matter of Wilkinson*.

In the Matter of Franklin's Charity, there was a gift of a perpetual annuity of 50*l.*, to be disposed of in charity. In the case *In the Matter of Wilkinson*, the judges seem to have considered that there was a gift of a sum in gross, which was at once to be disposed of by the executors, apparently, as if it was not a charity. It seems to me that that, of itself, furnishes a very considerable difference between the two cases; because, if the bequest is to be considered as a charitable bequest in its origin, then this court must, of necessity, have a dominion over the subject of the bequest; and this court will, from time to time, determine in what manner the property shall be employed; and, long before any person participates, the legacy must be paid.

Now it appears to me that, with respect to the duty of legacies, the matter stands in this way. The first act, I believe, that imposed any duty at all, was the *20th Geo. III, c. [*89] 28, and that enacted, generally, that, for every skin or piece of vellum, or parchment, or sheet, or piece of paper, upon which any receipt or other discharge, for any legacy left by any

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will or other testamentary instrument, or for any share or part of a personal estate divided by force of the Statute of Distributions or the custom of any province or place, should be engrossed, a certain amount of duty should be paid. It mentioned the word "legacy" generally. Then the 36 Geo. III, c. 52, was passed; and it imposed a duty with reference to the value of the legacy, to be calculated in a certain way. And the eleventh section of that act provides for the case where the benefit is given in such terms that the amount or value can only be ascertained, from time to time, by actual application. That is one case which that section provides for. The other case is: "or if the amount or value cannot, by reason of the form or manner of the gift, be so ascertained that the duty can be charged thereon under any other of the directions herein contained." But I should very much doubt whether either portion of this section applies to a case where the whole subject of the bequest must be taken *in solido*, at once, for the purpose of being applied, in perpetuity, in some manner that may be such that no one individual will ever participate in the subject itself, but will have a benefit which results from the application of a large sum of money in some given manner, not consisting in the payment of money.

Then supposing that the term "legacy," which is a general term used in the first of the statutes, is to be taken as descriptive of the thing which is to be assessed to the duty in the subsequent statutes, you clearly have legacies generally assessable.

[*90] *Then, for the purpose of assessment, it should be considered whether, if a residue is given, as this residue is for the purpose of founding a school,—whether that gift being for the benefit of some portion of the human race, it does not strictly come within the description of a legacy given for the benefit of a stranger in blood to the deceased. This legacy is for the foundation of a school for the benefit of the poor of Ireland within a certain neighborhood: and my opinion is that it is assessable to the duty, at the rate of ten per cent.; because it is for the benefit of persons strangers in blood to the deceased. And, moreover, it is so given that it does not fall within the

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eleventh section of the 36 Geo. III, or within the reasoning of the learned judges in the case *In the Matter of Wilkinson*: but it is given, substantially, in the same manner as if there were now existing a school for the education of the children of the poor in or about the city of Limerick, and the legacy were given to that school.

It seems to me to be, in substance, the same thing, whether the aggregate sum is, at once, given for the foundation of a school, *de novo*, or for the continuance of a school actually in existence.(a)

(a) See *The Commissioners of Charitable Donations v. Devereux*, ante, p. 14; *Grant v. The Advocate-General*, post.

*COOKE v. CRAWFORD.

[*91]

Trust (Delegation of).—Vendor and Purchaser.—Title.

1842: 12th July.

Testator devised his real estates to A., B. and C., in trust that they, or the survivors or survivor of them, or the heirs of the survivors, should, as soon as conveniently might be after his decease, but at their discretion, sell the same; and he empowered them and their heirs to make contracts with and conveyances to the purchasers; and declared that the receipts of them or the survivors or survivor of them, or the heirs, executors or administrators of such survivor, should be good discharges to the purchasers; and he directed that they, their heirs, administrators and assigns, should hold the proceeds of the sale upon certain trusts. A. and B. disclaimed, and C. alone acted. He devised the estates to M. and N. upon the trusts affecting the same. After his death, M. and N. agreed to sell the estates to P. Held, that M. & N. were not entitled to execute the trust for sale, as they were the devisees and not the heirs of C.

Trustee.—Costs.

If an estate is devised to A. and his heirs upon certain trusts; A. ought not to devise the estate, but ought to let it descend to his heir. If he devises it, his assets ought to bear the costs of the getting the legal estate out of his devisee.

WILLIAM HALL, by his will dated in 1836, devised his estates in Lincolnshire to his son, William Hall, and to John Burkitt and W. Wooley, upon trust that they, or the survivors or survivor of them, or the heirs of such survivor, should, as soon as con-

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veniently might be after his decease, *but at their discretion*, sell his said estates, either by public auction or by private contract, and either altogether or in several parcels, for such price or prices as they should consider the value thereof: and, for the purpose of effecting any and every such sale, he empowered his trustees *and their heirs* to enter into and execute all necessary contracts, conveyances or other assurances to or in favor of the purchaser or purchasers of such estates respectively, his, her or their appointees, heirs or assigns: and he declared that the written receipt or receipts of the said William Hall the younger, [*92] *John Burkitt and William Woolley, or of the *survivors or survivor of them, or the heirs, executors or administrators of such survivor*, should be good discharges to the purchasers: and he directed that his trustees, their heirs, executors or administrators, should stand possessed of the money to be produced from the sale of his real estates, upon the trusts therein mentioned: and he bequeathed his personal estate to the same trustees, upon trust that they or the survivors or survivor of them, or the executors or administrators of such survivor, should, as soon as conveniently might be after his decease, at their discretion, call in and convert the same into money: and he directed that his trustees, their heirs, executors, administrators *and assigns*, should hold the proceeds of his real and personal estate upon the trusts therein expressed: and he appointed the trustees the executors of his will.

The testator died in 1836. William Hall, his son, alone proved his will and entered into the possession of his real estates. Burkitt and Woolley renounced the probate and disclaimed the trusts of the will.

William Hall, the son, continued in possession of the estates until his death. He died in 1841, having devised all the estates which were vested in him as a trustee, to the plaintiffs and their heirs, subject to the trusts affecting the same. A few months after his death, the plaintiffs, in performance of the trust for sale contained in the will of William Hall the elder, agreed to sell part of the devised estates to the defendant. The defendant re-

fused to complete his purchase on the ground that the plaintiffs, as devisees under the will of William Hall the younger, could not execute the trust for sale contained in the will of William Hall the elder, and *could not made a good title or [*93] give a good discharge for the purchase money, without the concurrence of the *cestuis que trust* under the last mentioned will.

Mr. *Stuart* and Mr. *James Parker* in support of a demurrer put in by the purchaser to a bill for a specific performance of the contract, said that, according to the will of William Hall the elder, a discretion as to the time and manner of selling the devised estates was to be exercised; and that the only persons in whom that discretion was reposed, were the three persons named as the trustees, or the survivors or survivor of them, or *the heirs* (not assigns) of the survivor of them.—[THE VICE-CHANCELLOR: The authority to enter into contracts with the purchasers and to execute conveyances to them, is given to the trustees and *their heirs*.] The word “heirs,” there means the heirs of the survivor. It is true that the word “assigns” occurs in a subsequent clause in the will; but no discretion is given to the trustees by that clause.

In *Bradford v. Belfield*,^(a) your Honor held that a trust for sale vested in A. and his heirs, could not be exercised by an assign of A.; notwithstanding assigns were mentioned in the receipt clause. In the present case there is no such variance between the trust for sale and the receipt clause: the one is consistent with the other. In *Townshend v. Wilson*,^(b) it was decided that a power of sale given to three persons and their heirs, could not be exercised by two of them after the death of their co-trustee, although the purchase money was directed to be paid to the three donees *of the power, or *the survivor or* [*94] *survivors of them*, or the executors, administrators or assigns of such survivor. If the trust in this case can be exercised by the devisees of the surviving trustee, it might have been ex-

(a) *Ante*, Vol. II, p. 264.

(b) 1 Barn. & Ald. 608, and 3 Madd. 261.

1842.—Cooke v. Crawford.

exercised by his alienee by deed : for there is no difference, in that respect, between an alienee or assign by act *inter vivos*, and an alienee or assign by devise. *Hall v. Dewes*,^(a) *Cole v. Wade*.^(b) In the last case Sir William Grant, M. R., said that, wherever a power is of a kind that indicates personal confidence, it must be, *prima facie*, understood to be confined to the individual to whom it is given, and will not, except by express words, pass to others to whom, by legal transmission, the same character may happen to belong.

Mr. G. Richards and Mr. Jebb in support of the will :—According to *Adams v. Taunton*,^(c) the legal estate in the trust tenements is now vested in the devisees of William Hall, the younger. It is clear that he might have sold those tenements ; and the only question is whether his devisees have not the same power. The discretion as to the time and mode of sale, is given to the trustees or the survivors or survivor of them, or the heirs of such survivor ; and the power of entering into contracts with and executing conveyances to the purchasers, is given to the trustees and their heirs. It is plain, therefore, that the testator intended the discretion to be exercised and the contracts and conveyances to be made by the same persons. But, according to the [*95] argument in support of the demurrer, there would *be one person to exercise the discretion, and another to execute the conveyances. The receipts for the purchase moneys are to be given by the trustees or the survivors or survivor of them, or the heirs, *executors* or administrators of such survivor ; and, in the very next clause, he speaks of assigns, as well as heirs, executors and administrators. He, therefore, plainly had in his contemplation persons who might be nominated by the surviving trustee. Why then is the word "heirs" to be held not to include *haeredes facti* as well as *haeredes nati* : why is it to be confined to the latter ? It would be most inconvenient to hold that one person is to perform the trust for sale, that another is to

(a) Jac. Rep. 189. In *Hall v. Dewes*, Lord Eldon disapproved of the decision in *Townsend v. Wilson*. See 2 Sugd. on Pow. 489 *et seq.*

(b) 16 Ves. 27. See 44 *et seq.*

(c) 5 Madd. 435.

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execute the conveyances to the purchasers, and that a third is to give the receipts to the purchasers. Besides, another inconvenience might arise from holding that the trust could not be performed by any person except the *haeres natus*. The person filling that character might be an infant.

The case of *Bradford v. Belfield* is clearly distinguishable from the present; for, in that case, the heir of the trustee was guilty of a breach of trust in conveying the trust estate to another person. He had no power to appoint a new trustee by an act *inter vivos*. The will in *Cole v. Wade* was of a very different description from the will in the present case. The trustees were not only to exercise a discretion as to the time and mode of selling the testator's property, but were also to select the persons amongst whom the proceeds were to be distributed and the proportions in which they were to take. The testator evidently reposed confidence in the trustees personally: and, on those grounds, Sir William Grant held that the persons whom the surviving trustee had appointed to execute the trusts of *the testa- [*96] tor's will, and who (it must be remembered) were not the persons to whom he had thought proper to entrust the management of his own property, could not execute the trusts attempted to be delegated to them. That learned judge, however, did not decide that the word "heirs," is never to be held to mean the *haeres factus*, but is, in all cases, to be confined to the *haeres natus*.

THE VICE-CHANCELLOR:—I am of opinion that the demurrer in this case must be allowed; for it is plain that the persons whom the surviving trustee has thought proper to appoint to execute the trusts of the testator's will, are persons to whom no authority was given for that purpose by the testator; and there is no case in which a person not mentioned by the party creating the trust, has been held entitled to execute it.

I have always understood, ever since the point was decided in *Hawkins v. Kemp*,^(a) (or, rather was, as the judges said in that

(a) 3 East, 410.

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case, properly abandoned by the defendant's counsel, as not capable of being contended for,) that, where two or more persons are appointed trustees, and all of them except one renounce, the trust may be executed by that one. That decision, if it may be so called, has been approved of by Lord Eldon and other judges.

Now, in the present case, the testator has devised his estates in the county of Lincoln, to his son, William Hall, and his friends, James Burkitt and William Woolley, upon trust [*97] that they and the survivors or *survivor of them, or the heirs of such survivor, should, as soon as conveniently might be after his decease, but at their discretion, sell his estates either by public auction or by private contract, and either altogether or in parcels, for such price or prices as they should consider the value thereof; and, for the purpose of effecting any and every such sale, he has empowered his trustees and their heirs to enter into and execute all necessary contracts, conveyances and other assurances to or in favor of the purchaser or purchasers of his estates. Then he proceeds to declare that the written receipt or receipts of the trustees, or of the survivors or survivor of them, or the heirs, executors or administrators of such survivor, shall be good discharges to the purchasers.

It is observable that the testator has not used the word "assigns" either in the clause in which he has created the trust for sale, or in either of the two clauses that follow it, in which he points out the machinery by which the sale is to be effected. He does not introduce that word until he begins to speak of something that is to be done after the sale has taken place, that is until he declares the trusts upon which the proceeds of the sale are to be held. Therefore, it is plain that, when William Hall, who, by the disclaimer of Burkitt and Woolley, became the sole trustee, thought fit to devise the legal estate that was vested in him, he did an act which he was not authorized to do.

And here I must enter my protest against the proposition, which was stated in the course of the argument, that it is a beneficial thing for a trustee to devise an estate which is vested in him

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in that character. My opinion is that it is not beneficial to the testator's estate that he should be allowed to dispose of it to whomsoever *he may think proper; nor is it lawful [*98] for him to make any disposition of it. He ought to permit it to descend; for, in so doing, he acts in accordance with the devise made to him. If he devises the estate, I am inclined to think that the court, if it were urged so to do, would order the costs of getting the legal estate out of the devisee, to be borne by the assets of the trustee. I see no substantial distinction between a conveyance by act *inter vivos*, and a devise; for the latter is nothing but a *post mortem* conveyance; and if the one is unlawful, the other must be unlawful.

It appears to me that, as my decision in *Bradford v. Belfield* has been acquiesced in, the question raised by the demurrer in this case is concluded by that decision: but, if it is not, then the authority of *Townsend v. Wilson* is binding on the point. And my opinion is that the plaintiffs, who may be properly called the assigns of William Hall, the sole acting trustee of the testator's will, are not the persons to execute the trusts of that will: consequently, I shall allow the demurrer.

*CRESY v. BEAVAN.(a)

[*99]

Plaintiff.—Injunction.

1842: 16th July.

A plaintiff who has obtained the common injunction, cannot sustain it on grounds contained in the answer, but not stated in his bill.

THE bill in this case was filed for the purpose of having a bond delivered up to be cancelled, on the ground that it had been wholly paid, and for an injunction to restrain an action at law thereon. The bill, however, made no case for taking the accounts prayed by it, on the ground of their being complicated.

(a) The reporter is indebted to his friend, Mr. Beavan, for the above report.

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The common injunction was obtained for want of answer.

The defendant afterwards put in his answer, in which he stated circumstances and accounts of some complexity, which showed that a large sum was still due on the bond.

Mr. *Wakefield* and Mr. *Faber* for the plaintiff, now showed cause, upon the merits confessed in the answer, against dissolving the injunction, and contended that it appeared, from the answer, that the accounts were of that complicated nature that they could not be properly taken except in a court of equity.

Mr. *Bethell* and Mr. *Beavan*, for the defendant, insisted, amongst other arguments, that it was not competent for the plaintiff to sustain the injunction on grounds not raised by the bill.

Mr. *Wakefield* in reply.

[*100] *THE VICE-CHANCELLOR:—The case before me for consideration, is whether the rule *nisi* should be made absolute.

Now one must consider what is the case which the plaintiff has chosen to make, and what is the admission of that case on the answer; because, if the plaintiff chooses to select a set of circumstances as constituting his case, and the defendant, on his answer, represents that the facts of the case were totally different, and are such as he represents on his answer, this court will not allow the plaintiff, in opposition to his own case on the bill, to speculate on the facts which are stated in the defendant's answer, and say that, out of them, an equity arises which he has not thought proper in the first instance to adopt. In the case of the executors of Mr. Plowden against a person who was Mr. *Wakefield's* client, a case of a given kind was stated on the bill. The defendant put in an answer, certainly stating some very strong circumstances, and on which one might have thought that, if they had been only adopted by the plaintiff in his bill and confessed by the defendant, there would have been a clear case for an in-

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junction against the defendant. But what happened? The matter was opened to me as if the case between the parties was the case in the answer; whereas the very first observation made to me by the defendant's counsel, was that the case stated for the plaintiff was that described in the answer, but it was not the case alleged on the bill. What was actually done? I dissolved the injunction; and then the bill was amended, abandoning the original case and substituting the case which the defendant had put on his answer: after which, when an application was made to me, I of course granted an injunction.

*Now this present bill has not at all raised the points [*101] which have been discussed before me to day; because, after stating some of the preliminary facts about which there is no dispute, it states that the last mentioned bond was fully satisfied. The defendant, by his answer, gives a positive denial to all this, following the very language of the bill; and then he represents that various orders were made by the court in France: and there being no averment at all in the bill respecting those orders, *prima facie*, that is a sufficient statement that they were made and were binding, and that they were made by a court of competent authority.

If the plaintiff thinks that, by means of the statements which the defendant has put on his answer, if put on his bill and adopted as his case, and by reasoning on them, he can show that he has an equity, let him do so. All that I can say is this, that as the plaintiff has thought proper, for the purpose of this discussion, to misstate his case, and as the defendant has altogether denied the case made by the plaintiff's bill, my opinion is that the order must be made absolute.

1842.—Chester v. Chadwick.

[*102]

*CHESTER v. CHADWICK.

Appointment—Power.

1842: 8th July.

Testator gave 7,000*l.* stock to trustees, in trust to pay the dividends to his son for life, and after his death, to pay the capital and dividends to and amongst all his children, at such time, or times, age or ages, and in such proportions, manner and form, and for such intents and purposes in all respects, as the son should appoint; and, in default of appointment, to pay and divide the same unto and equally amongst all the children, as they should severally attain twenty-one, and, in the meantime, to apply the dividends for their maintenance as the trustees should think fit. The son, by his will, directed that the stock should not be divided amongst his children until their mother's death, and that she should receive the dividends during her life, and apply the same, in the exercise of her sound discretion, for the best interest and advantage of his children, and that, on her death, the capital should be divided amongst the children in certain proportions. The son left eleven children, some of whom were adult.

Held, that the son's will was not a good execution of the power, so far as it directed the dividends of the stock to be paid to his wife during her life.

WILLIAM CHESTER, by his will dated the 15th of June, 1812, gave 7,000*l.* consols to trustees, in trust, to pay the dividends to his son for life, and, after the son's decease, upon trust to pay the capital and the dividends thereof, to and amongst all his children, at such time or times, age or ages, and in such proportions, manner and form, and for such intents and purposes in all respects as the son should, by deed or will, appoint; and, in default of appointment, upon trust to pay and divide the same unto and equally amongst all the children, as and when they should attain twenty-one being sons, or at that age or on their marriage being daughters; and in the meantime to apply the dividends for their maintenance, education and support, or placing them out in the world in such manner as the trustees should think fit: and the testator empowered the trustees to apply all or any part of each child's proportion of the capital, during his or her minority, in the advancement or placing out in the world of that child, as they should think would tend to his or her benefit and advantage: and he directed that, in

[*103] default of appointment by his *son, the children should take a vested interest in the capital as and when they

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should attain twenty-one being sons, or at that age or on their marriage, being daughters.

The testator died on the 12th of February, 1816.

The son, by his will dated the 13th March, 1836, after expressing his wish that such of his daughters as, at his death, should be unmarried, and also his youngest son, should remain under the guardianship of their mother; directed, in order that their mother might be better enabled to extend her care and protection to them, and in conformity with the powers vested in him by his father's will, that the 7,000*l.* stock *should not be divided amongst his children as they should severally attain twenty-one, but that the division thereof should not take place until after the decease of their mother, and that she should receive the dividends for her life, and apply the same, in the exercise of her sound discretion, for the best interest and advantage of his children:* and he also directed that, after the death of his wife, the sum of 5,000*l.* of the consols should be equally divided amongst his five youngest children, with benefit of survivorship amongst them whenever they should attain twenty-one being sons, or on their marriage being daughters, and that the interest should be applied, during the minority of each of them, for his or her maintenance and education, and that after the death of their mother, the remaining 2,000*l.* of the consols should be divided amongst his six eldest children, in manner following, (that is to say,) to his eldest son Edward William Chester, 1,500*l.* consols, to Robert Chester, 50*l.* consols, to Charlotte Copleston, 50*l.* consols, to Caroline Dartwell, 100*l.* consols, to Louisa Blenkinsop, 50*l.* consols, and the remaining *250*l.* consols to Emma Wapshaw; and that, in the [*104] event of the death of either of the legatees of the five last mentioned sums before the period assigned for the payment of the same, such sum or sums should be paid to his youngest son, or, in case of his death, to the youngest of his surviving children: and he further directed, in the full confidence which he had in the sound discretion and judgment of his wife, that, provided it should appear to her that the interest and advantage of his children generally, or of any one of them in particular,

1842.—*Chester v. Chadwick*.

would be promoted by the payment of his or her proportion of the moneys derived by his will, before the decease of his wife, then the trustees of his father's will, (with the desire and instruction of his wife to them communicated in writing,) should pay over to such child or children, the share or shares to which such child or children should be severally entitled by his will.

William Chester, the son, died on the 14th of March, 1836, leaving eleven children · seven of whom were of age when the bill was filed.

The bill was filed by all the children, in May, 1842; and, after stating as above, it alleged that the trustees of their grandfather's will, with the consent of such of the plaintiffs as were of age, had paid the whole of the dividends of the stock, up to the 5th of January, then last, to the plaintiffs' mother, for the maintenance, education and support of their children who were under age, all of whom resided with her: that doubts having been entertained, whether the appointment made by the will of William Chester, the son, was, in all respects, a valid execution of the power vested in him by his father's will, so far as re-
[*105] garded the appropriation of the dividends of the *stock and the postponement of the payment of the capital, the trustees had declined to make any further payment of the dividends or to deal with the capital without the direction of the court: and the plaintiffs submitted that the direction, contained in the will of William Chester the younger, for postponing the payment of the shares of the stock appointed by him to his children, was inoperative, and that such shares were payable, immediately, to such of the plaintiffs as were adult, and that the shares of the infant plaintiffs would be payable on their attaining twenty-one, or, as to such of them as were females, on their marriage, although their mother might be then living.

The bill prayed that the trusts of the will of William Chester the elder, might be performed under the direction of the court, having regard to the appointment or intended appointment made by William Chester the younger, and that the trustees might be

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directed to pay the dividends of the stock which had accrued since the 5th of January last, on the shares of such of the plaintiffs as were adult, to them, and also to pay to them the shares of the capital appointed to them by their father's will: and to pay the residue of the dividends to the mother of the plaintiffs, for the maintenance and education of such of them as were infants and unmarried: and that the trustees might be directed to pay and apply all future dividends of, and all the capital of the shares of such of the plaintiffs as were infants, as the court should think proper, according to the trusts affecting the same under the two wills.

Mr. Bethell and Mr. Glasse, for the plaintiffs, said that, by the father's will, the stock which was the *subject of [*106] the power, was to be divided amongst the son's children, at such time or times as the son should appoint; and, therefore, the son was justified in postponing the division until after his wife's death; that the direction respecting the dividends of the stock was not liable to the objection, *delegatus non potest delegare*; for they were to be applied for the benefit of the persons who were objects of the power; and the mother could not withhold a single shilling from them, nor was any discretion given to her as to the objects or the quantity of interest that they were to take; and that the words: "in the exercise of her sound discretion;" did not at all affect the validity of the appointment, as they were implied in the direction to apply the dividends for the maintenance of the children; and, if the discretion was not soundly exercised, the court would control it. *Ingram v. Ingram*; (a) *Alexander v. Alexander*. (b)

Mr. Jones appeared for the defendants, who were the trustees of the stock and the mother of the plaintiffs; but—

The VICE-CHANCELLOR, without hearing him said, shortly: It appears to me to be totally void.

The decree declared that the will of William Chester, the son,

(a) 2 Atk. 88.

(b) 2 Vez. 640.

1842.—Trevor v. Trevor.

was not a good appointment under the power given by the will of William Chester, the father, so far as the will of the son directed the income of the fund in question to be paid to the defendant Mary Ann Chester during her life; and that, as to the income of the fund during the life of the mother, the [*107] same was *payable under the limitation in default of appointment contained in the will of the father. The decree then ordered, *with the consent of the seven adult children*, that seven elevenths of the dividends of the fund should be paid to the defendant Mary Ann Chester, for the maintenance of the four infant plaintiffs, until further order, and that the remaining four elevenths should be paid to her for the same purpose.

Reg. Lib. A. 1841, fo. 1354 b.

*TREVOR v. TREVOR.

[*108]

Will.—Construction.—“Issue in Tail Male.”

1842: 20th, 25th and 27th July.

Testator devised his estates to trustees, in trust to settle and convey the same to the use of or in trust for G. R. (who had then no issue) for life, without impeachment of waste, with remainder to his issue in tail male, in strict settlement.

Held, that the words “in tail male” were descriptive, not of the issue, but of the interest that they were to have; and that the estates ought to be settled on G. R. for life, without impeachment, &c., with remainders to his sons, successively, in tail male, with remainder to his daughters as tenants in common in tail male, with cross remainders in tail male.

Construction.—Jointure.—Power.

Testator directed a settlement to be made of his estates, and a power to be inserted in it, enabling the tenant for life to jointure any wife or wives, at one or several times, to the extent of one-fifth part of the then ordinary annual rental of the estates. Held, that the settlement ought to authorize the tenant for life to charge the estates with a clear yearly rent charge, not exceeding one-fifth of the yearly rent of the estates payable at the time of creating the charge.

Will.—Construction.—Shifting Clause.

Testator made two wills, one of his estates in Sussex, and the other of his estates in Bedfordshire. By the latter, he devised those estates to trustees, in trust to settle them on G. R., who was heir to the barony of D., for life, with remainder to his

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issue in tail male, in strict settlement: "Upon the like condition to that I have made in my will of my Sussex estates, so far as the change of circumstances will permit, that the said estates shall go over to the party next entitled, on the person for the time being possessed, becoming entitled to the barony of D." Held, regard being had to the will of the Sussex estates, that the succession of a child or any male issue of a child of G. R. to the barony, ought not to exclude that child, or his issue male, from the enjoyment of the Bedfordshire estates, unless some other child, or the issue male of some other child of G. R. were in existence, to whom those estates might go over.

Will.—Construction.—Shifting Clause.—Name and Arms.

Testator directed his estates to be settled on G. R. for life, with remainder to his issue in tail male, in strict settlement; upon condition that all persons from time to time to come into possession of the estates, should take and use the name and arms of T. Held that the estates ought to be settled on G. R. for life, with remainder to his sons, successively, in tail male, with remainder to his daughters as tenants in common in tail male, with cross remainders in tail male; and that the proviso to be inserted in the settlement, as to taking the name and arms, and for giving over the estates on default, ought to be so expressed, as to take away the estates from the defaulting party and his descendants only; that is, if a grandson of G. R. were the defaulting party, the consequence ought not to extend to the grandson's brothers.

VISCOUNT HAMPDEN, being seized of real estates in Sussex and in Bedfordshire, and being possessed of personal estate to a large amount, made three separate *wills; one [*109] relating to his Sussex estates, another to his Bedfordshire estates, and the third to his personal estate. By his will relating to his Sussex estates, which was dated the 6th of September, 1824, he gave all his estates in that county to the Honorable Henry Brand for his life, or until he should succeed to the barony of Dacre, then enjoyed by his brother, Thomas Lord Dacre, without impeachment of waste, except spoil or destruction, or voluntary or permissive waste in houses and buildings, with power to lease any part of the estates for twenty-one years in possession, at rack rents; and, after his decease or his succeeding to the barony of Dacre, the testator gave the estates to Thomas Brand, the eldest son of Henry Brand, for life or until he should succeed to the barony of Dacre, with like power of leasing and without impeachment of waste except as aforesaid; and, after the determination of the estate of Thomas Brand in his lifetime by any other means than his succession to the barony

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of Dacre, the testator gave the estates to trustees, during his life or until he should succeed to the barony of Dacre, upon trust to preserve contingent remainders; and, after his decease or his succeeding to such barony, to his first and other sons successively in tail male, and, in default of such issue, to Henry Brand, his heirs and assigns forever. Provided that, whenever any [*110] son of Thomas Brand or his *issue male should succeed to the barony of Dacre, the estate of the person so succeeding thereto (provided that there should be then in existence any other son or issue male of any other son of Thomas Brand) should determine in like manner as if the son of Thomas Brand, who, or whose issue male should so succeed to the barony, were not only actually dead, but as if there were also an utter failure or extinction of male issue of such son of Thomas Brand, and, thereupon, the estates should go over to the next or other son of Thomas Brand, or his issue male to be entitled under the devises aforesaid. Provided that every person who, under the devises aforesaid, might come into the possession of the estates, should, within one year afterwards, either by license from the crown, or other proper means, take and bear the surname and arms of Trevor: and that in case any such person should, for such space of one year, neglect or refuse to take and bear such name and arms, or should afterwards discontinue to use the same, then the estate of such person should cease, if a tenant for life, as if he were dead, and, if a tenant in tail, as if he were dead and there were also an utter extinction or failure of his issue male, or of the issue male of the ancestor through whom he acquired his estate tail; and, thereupon, the estates should go over to the person entitled under the gifts aforesaid, as if such event or events had actually happened.

The will by which the testator disposed of his Bedfordshire estates, was dated the 8th September, 1824, and was in the following words: "I give and devise, unto the honorable Henry Brand and Joseph Rogers, and their heirs, all my real es- [*111] tates in the county of Bedford, upon trust that they *do and shall settle and convey the same to the use of or in trust for the honorable George Rice, son of Lord Dynevor, for

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life, without impeachment of waste, except permissive waste or spoliation; with remainder *to his issue in tail male in strict settlement*, upon condition that all person or persons from time to time to come into possession of the said settled estates, do and shall, within one year afterwards, take the name and bear the arms of Trevor; and also upon the like condition to that I have made in my will of my Sussex estate, *so far as the change of circumstances will permit*, that the said estate shall go over to the party next entitled, on the person for the time being possessed, becoming entitled to the barony of Dynevor; and, in default of *such issue* of the said George Rice, I devise my said Bedfordshire estate unto the said Henry Brand, his heirs and assigns forever. And I direct that, in the said intended settlement, shall be contained the usual, ordinary, or fair and reasonable powers of leasing for the said George Rice; and like powers for the trustees to preserve the contingent remainders during the minority of tenants in tail in possession; and also a power for the said George Rice, to jointure any wife or wives, at one or several times, to the extent of one fifth part of the then ordinary, annual rental of the settled estates; and also a power for the said George Rice, to portion a younger child or younger children, in such manner that the said estates shall not, for such purpose, be liable to a greater burden than the 10,000*l.* and interest thereon at 4 per cent. per annum; but so that the apportionment among the children be, in every respect, at the option, under the dominion of the said George Rice; and so that such settlement contain the usual powers of sale, exchange, partition and enfranchisement for the said George Rice, and the executors during the minority
*of each tenant in tail in possession; and a power of ap- [*112]
pointing new trustees, and every other proper or usual
power, provision, trust or clause that may be necessary or expedient in or for settlements of a like nature. And it is my will and intention that, notwithstanding the absolute devises contained in my will of the Sussex estate, in favor of the said Henry Brand and his son, and *issue male*, that a settlement, under the direction of the said Henry Brand and Joseph Rogers, or the survivor of them, be made of such estates, so as to include such

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powers, provisions and clauses, *mutadis mutandis*, as hereinbefore mentioned, concerning my Bedfordshire estates.”

The testator, by his will relating to his personal estate, which was dated the 7th September, 1824, appointed John Brooks, Robert Trevor and Joseph Rogers his executors; and, by a codicil dated the following day, he gave all the residue of his personal estate to his executors, upon trust to lay out one third part of it in the purchase of estates by way of addition to, and to be settled to the same uses as the Sussex estates; and to lay out another third part in the purchase of estates by way of addition to, and to be settled to the same uses as the Bedfordshire estates.

The testator died on the 9th of September, 1824. Thomas Lord Dacre, (the brother of Henry Brand,) George Lord Dynevor and George Boscawen, Esquire, were the testator's co-heirs.

George Rice Trevor, was the only son of George Lord Dynevor, and heir apparent to the barony of Dynevor, which is a barony by letters patent, and descendible to heirs male [*118] only. The barony of Dacre, is a barony by writ, and is descendible to heirs general. Soon after the testator's death, Henry Brand and George Rice assumed the name and arms of Trevor.

George Rice Trevor had no issue at the testator's death; but he afterwards had five daughters, of whom Frances Emily was the eldest.

The court having referred it to the master to approve of a proper settlement, in pursuance of the will and codicil, of the Bedfordshire estates, of which the testator died seised, and of the estates which had been purchased in addition thereto, with one-third of the testator's residuary personal estate, the master approved of the draft of a settlement by which the estates were expressed to be conveyed to George Rice Trevor for life, without impeachment of waste, except permissive waste or spoliation;

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with remainder to trustees during his life, to preserve contingent remainders; with remainder to *his first and other sons successively in tail male*; with remainder to *Henry Trevor in fee*; with power to George Rice Trevor, from time to time, and at one or several times, to appoint to his present or any future wife for the time being, for her life, for her jointure, any annual sum or yearly rent charge, not exceeding in amount, for any such wife, one fifth part of the then ordinary annual rental of the estates then standing settled to the uses of the settlement, and to be made payable half-yearly or quarterly, and to be issuing out of, and charged upon all or any part or parts of the hereditaments therein mentioned, to be thereby released; and also with power to G. R. Trevor during his life, and, after his decease, to the persons named as trustees in the draft, to lease the estates, during the minority of *any son* of George Rice Trevor, who, under the limitations, **should be entitled to the actual* [*114] freehold or inheritance of the estates; and with a proviso that, in case George Rice Trevor, or any son of his body, or any issue male of any such son, should succeed to the barony of Dynevor, then and in such case, and so often as the same should happen, the estates should go and remain to the uses to which the same would have stood limited under the limitations therein contained, if the person who should so succeed to the barony of Dynevor were dead, and if, in the case of such person being a son of George Rice Trevor, or any issue male of any such son, *there was a failure of the issue male of such son*; and also with a proviso that every person who, under the limitations, should become entitled to the estates for an estate in tail male in possession, (a) should, within one year afterwards, take and use the name and arms of Trevor; and that, in case any such person should refuse or neglect so to do, or should, at any time afterwards, discontinue to use such name or arms, or in case George Rice Trevor, or any other person who, at the time of his so becoming entitled, should use such name and arms, should, at any time thereafter, discontinue to use the same, then the estates

(a) There seems to be some incorrectness in this proviso. In its commencement it is confined to a tenant in tail male, but afterwards, it is made to extend to Geo. Rice Trevor, who was tenant for life only.

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should go and remain to the uses to which the same would have stood limited, under the limitations therein contained, if the person who should so refuse, neglect or discontinue were dead, and if, in the case of such person being a son of George Rice Trevor, or any issue male of any such son, *there were a failure of the issue male of such son.*

George Rice Trevor excepted to the report; first, because the master had not inserted in the draft, immediately after [*115] *the limitations to his first and other sons in tail male, a limitation in favor of his daughter and daughters.

Secondly, because the power of jointuring ought to have authorized him to charge the estates with a *clear* yearly rent charge not exceeding one-fifth of the ordinary, annual rental of the estates, to be payable without any deduction whatsoever.

Thirdly, because the power enabling the trustees to lease the estates during the minority of any *son*, ought to have been a power enabling them to lease the estates during the minority of any *child* or *children* of George Rice Trevor.

The fourth exception was as follows:—"For that the said draft of the said indenture of release and settlement, contains a proviso in the words following (that is to say): Provided always, and it is hereby agreed and declared, that, in case the said George Rice Trevor, or any son of his body or any issue male of any such son, shall succeed to the title and dignity of Baron Dynevor, then and in such case and immediately thereupon, and so often as the same shall happen, the said manors and lordships, and other hereditaments, hereby released, shall go and remain to the uses, and with, under and subject to the powers, provisos and declarations to, upon, for, with, under and subject to which the same premises would have stood limited and settled under the limitations and provisions herein contained, if the person who shall so succeed to the title and dignity of Dynevor as aforesaid, were dead, and if, in case of such person being a son of the said George Rice Trevor, or any issue male of any such son, *there were a failure of*

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*the issue male of *such son.* Whereas, the said master [*116] ought not to have allowed the said last-mentioned proviso to be contained in the said draft; but, in lieu thereof, ought to have inserted a proviso in the words following, that is to say: Provided always, and it is hereby agreed and declared, that, in case the title and dignity of Baron Dynevor shall descend to, or devolve upon, *any person or persons hereby made tenant in tail male*, of the hereditaments hereby released, or to or upon any issue male of any such person or persons, then and in that case, and so often as the same shall happen, the use or uses hereinbefore limited to or for the benefit of such person or persons, or issue male as aforesaid, to or upon whom the said title and dignity shall descend or devolve, of, and in the hereditaments hereinbefore released as aforesaid, shall cease, determine and become void, as if such person or persons, or issue male, was or were actually dead *without issue male of his, her or their body or bodies*; and then, and in such case, the hereditaments and premises hereby released, shall, immediately thereupon, go to the person next beneficially entitled in remainder under the limitations hereinbefore contained, in the same manner as if the person or persons whose estate or estates shall so cease, determine and become void, was or were dead *without issue male inheritable under such entail*. Or otherwise the said master ought to have inserted a proviso in the words following, that is to say: Provided always, and it is hereby agreed and declared, that, in case the title and dignity of Baron Dynevor shall descend to, or devolve upon, any person or persons hereby made tenant in tail male of the hereditaments hereby released, or to or upon any issue male of any such person or persons, then and in that case, and so often as the same shall happen, the use or uses hereinbefore limited to or for the benefit of such person *or persons, or issue [*117] male as aforesaid, to or upon whom the said title and dignity shall descend or devolve, of and in the hereditaments hereinbefore released as aforesaid, (*provided that there shall also then be in existence any other child or the issue male of any other child of the said George Rice Trevor,*) shall cease, determine and become void, in like manner as if the child of the said George Rice Trevor, who or whose issue male shall then so succeed to the said barony,

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were not only actually dead, but as if there were also an utter failure or extinction of *male issue of such child* of the said George Rice Trevor; and then, and in such case, the hereditaments and premises hereby released shall, immediately thereupon, go to the persons next beneficially entitled in remainder under the limitations hereinbefore contained, and in the same manner as if the said child of the said George Rice Trevor, who or whose issue male shall then so succeed to the said barony, were not only actually dead, but as if there were also an utter failure or extinction of male issue of such child of the said George Rice Trevor.

The 5th exception was that, instead of the proviso that every person who, by virtue of the limitations, should become entitled to the estates for an estate in tail male in possession, should, within one year after, take and use the name and arms of Trevor; and that, in case any such person should refuse or neglect so to do, or should discontinue to use such name and arms, or in case G. R. Trevor, or any other person who, at the time of so becoming entitled, should use such name and arms, should, afterwards, discontinue to use the same, then the estates should go and remain to the uses to which the same would have stood limited if the person who should so refuse, neglect or discontinue, [*118] were dead, and if, in the *case of such person being a son of G. Rice Trevor, or any issue male of such son, there were a failure of the issue male of such son; the master ought to have inserted a proviso that all and every the person and persons who, by virtue of the limitations, should become entitled to the estates for an estate in tail male in possession, and who should not then use the name and arms of Trevor, should, within one year after take and use such name and arms; and if any such person or persons should neglect or refuse so to do, then the use or uses limited to such person or persons should cease, as if such person or persons was or were actually dead without issue male of his, her or their body or bodies, and the estates should thereupon go over to the person or persons next entitled in remainder, in the same manner as if such person or persons was or were dead without issue male inheritable under the entail.

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Francis Emily, the eldest daughter of George Rice Trevor, excepted to the report, because the draft of the settlement did not contain a limitation to the first and other daughters of George Rice Trevor, successively in tail male, in default of issue male of the sons: and because the leasing power did not enable the trustees to lease the estates during the minority of any *child or children*, but only during the minority of any *son* of George Rice Trevor.

The four youngest daughters also excepted to the report.

They insisted, first, that the estates ought to have been limited, in default of issue male of the sons, to all the daughters of George Rice Trevor, as tenants in common in tail male, with cross remainders amongst them in tail male:

*Secondly, they excepted to the leasing power on the [*119] same ground as their eldest sister has done:

And, thirdly, they contended that the proviso as to taking the name and arms of Trevor, ought to have provided that *all and every the person and persons* who should become entitled to the estates for an estate in tail male in possession, should, within one year after, take and use the name and arms of Trevor; and if any such person *or persons* should refuse or neglect so to do, or if George Rice Trevor should discontinue to use such name and arms, the use or uses thereinbefore limited to such person *or persons*, should cease as if, in the case of George Rice Trevor, he were actually dead, and as if, in the case of any other person *or persons*, he, she *or they* was *or were* actually dead without issue male of his, her *or their* body *or bodies*, and thereupon the estates should go to the person *or persons* next beneficially entitled in remainder.

The eldest daughter also took a similar exception, omitting the words printed in italics: so that her exception was applicable to the case of the daughters being entitled to the estates in succession.

From the preceding statement it appears that the first in each of the three sets of exceptions, was grounded on the omission, in the draft of the settlement, of a limitation in favor of the daughters of George Rice Trevor. There was, however, this difference between them; that, while George Rice Trevor insisted, merely, that *some* limitation in favor of his daughters ought to have been inserted in the draft immediately after the estates in tail male limited to his sons, his eldest daughter contended that [*120] the limitation ought to have been to the *daughters successively in tail male; but her sisters insisted that the limitation ought to have been to all the daughters as tenants in common in tail male, with cross remainders amongst them in tail male.

The third exception taken by George Rice Trevor and by his eldest daughter, and the second exception taken by his four youngest daughters, pointed only to alterations in the settlement which might be rendered necessary by, and were dependent on the decision upon the first exception in each set.

The second exception taken by George Rice Trevor, applied to the form of the power to jointure which was given to him as tenant for life of the settled estates; and which he objected to because it did not enable him to charge, by way of jointure, a *clear* annual sum not exceeding one-fifth of the rental of the estates, to be payable *without any deduction*.

The fourth exception of the same party, raised an objection to the draft, with respect to the proviso for shifting the estates on the succession of the person in possession of them to the barony of Dynevor. With regard to that point, alternative clauses were submitted to the court, both of which went to exclude George Rice Trevor from the operation of the shifting clause. There was, however, this difference between them—that while, by one of the proposed clauses, if the barony should devolve on any issue male of a child of George Rice Trevor, the individual succeeding to it and his issue male, would be alone excluded from the enjoyment of the estates; such exclusion, however, being, in

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that event, to take place without reference to the state of the family of George Rice Trevor at the time; by the other *proposed clause, the estates were to shift, in the event [*121] in question, so as to exclude, not only the person succeeding to the barony and his issue male, but also, in case that person should be the descendant of a child of George Rice Trevor, all the issue male of the child from whom he descended, provided any other child of George Rice Trevor, or issue male of any other child, should be then in existence, but not in any other state of circumstances.

The third exception of the four youngest daughters, related to the consequence of an omission, on the part of any possessor of the estates, to take and use the name and arms of Trevor. The proviso in the draft relating to that omission, did not apply to a plurality of takers: and, moreover, it imposed a forfeiture on the whole descending line from any child of George Rice Trevor, in case any descendant of that child should be in possession of the estates and should omit to comply with the condition. For this the four youngest daughters proposed, by their third exception, to substitute a clause applicable to the event of the estates devolving on the daughters of George Rice Trevor as tenants in common, and confining the forfeiture to the person guilty of the omission and the descendants of that person.

The *Solicitor-General* and Mr. *Romilly*, in support of the first exception taken by George Rice Trevor:—The most important question raised by the exceptions, is whether, in the settlement to be made of the late Lord Hampden's Bedfordshire estates, in pursuance of the direction for that purpose contained in his will, any limitation should be inserted in favor of the daughters of Mr. Rice Trevor.

*By Lord Hampden's will relating to his estates in [*122] Sussex, those estates were devised, directly, to Henry Brand for life or until he should succeed to the barony of Dacre, with remainder to his eldest son, Thomas Brand, for life or until he should succeed to the same barony, with remainder to his first

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and other sons in tail male, with remainder to Henry Brand in fee. The will relating to the Bedfordshire estates, did not contain direct devises, but was an executory will. The trustees of it were directed to settle the estates to which it related, on George Rice, now George Rice Trevor, for life, with remainder to his issue in tail male in strict settlement; subject to certain conditions as to taking the name and arms of Trevor, and as to the estates going over on the person in possession of them becoming entitled to the barony of Dynevor; and, in default of such issue of George Rice, the testator devises his Bedfordshire estates to Henry Brand in fee. He then directs that the intended settlement shall contain powers enabling George Rice to grant leases of the estates, to charge them with a jointure and with portions for younger children, and also powers of sale, exchange, &c., and all other powers usual and proper in settlements of the like nature.

The draft of the settlement which the master has approved of, limits the Bedfordshire estates to George Rice Trevor for life, with remainder to his first and other sons successively in tail male, with remainder to Henry Brand in fee, omitting altogether the daughters of George Rice Trevor. Now it so happens that that gentleman has no son, but he has five daughters; and, consequently, it is very important to consider whether the

[*128] draft is right in entirely omitting the daughters. *Your

Honor will observe that that question depends, altogether, upon the construction which is to be put upon the word "issue" in the will disposing of the Bedfordshire estates. That will directs those estates to be settled on George Rice Trevor for life, without impeachment of waste except permissive waste or spoilation, with remainder to his issue in tail male. *Prima facie*, it would seem to be beyond all doubt that a direction to settle an estate on a given individual for his life, without impeachment of waste, with remainder to his issue in tail male in strict settlement, would comprehend both his sons and his daughters; and if, as was the case with respect to George Rice Trevor, that individual had no issue at the time when the will took effect, the settlement would be confined to his sons and daughters.

No argument upon this part of the case, can be founded on the will disposing of the Sussex estates; for the two properties are very differently disposed of. The Sussex estates are limited to Henry Brand (who stood in the same degree of relationship to the testator as George Rice Trevor did) for his life, with remainder to Thomas Brand, his eldest son, for life, with remainder to the first and other sons of Thomas Brand in tail male, with remainder to Henry Brand in fee: so that there is no limitation whatever to the second or other younger sons of Henry Brand. And, although Henry Brand and George Rice Trevor were related, in the same degree, to the testator, the limitations of the two estates are altogether different. Besides, as the Sussex estates were limited to Henry Brand in fee, on failure of his eldest son's issue male, he would have it in his power to make any provision he might think proper for his younger sons, for his daughters, or for the daughters of *his eldest son. The [*124] Bedfordshire estates, however, are not limited, ultimately, to George Rice Trevor in fee, but to Henry Brand in fee.

It is important, when we are considering whether the ordinary meaning of the word "issue," in the early part of this will, is to be cut down, to look at the concluding clause of the will, where the testator directs that, notwithstanding the absolute devises contained in his will of the Sussex estates in favor of Henry Brand and his son and issue male, a settlement shall be made of those estates under the direction of Henry Brand and Joseph Rogers, so as to include powers, provisions and clauses similar to those before mentioned concerning his Bedfordshire estates. Now it is plain that the testator, when he spoke of the devises of his Sussex estates in favor of Henry Brand and his son and issue male, meant devises to Henry Brand for life, with remainder to his son for life, with remainder to the first and other sons of that son in tail male; for that was the mode in which he had devised his Sussex estates. But, in the preceding part of this will, he does not direct his Bedfordshire estates to be settled on George Rice Trevor and his issue male, but on George Rice Trevor for life, with remainder to his issue in tail male, in strict settlement: and as he has used different language with regard to his Bedfordshire

estates, from that which he has used with regard to his Sussex estates, he could not mean that the same course of limitation should be adopted in settling both of them.

We submit that, unless the court can find, from the will, a clear and distinct intention, on the part of the testator, to use the word "issue," in a confined and limited sense, that [*125] word must have its ordinary meaning *given to it; and then it will comprehend daughters as well as sons. And as the testator has directed his Bedfordshire estates to be settled on George Rice Trevor with remainder to his issue in tail male in strict settlement, those estates ought to be settled on that gentleman for life, with remainder to his first and other sons successively in tail male, with remainder to his daughters successively in tail male.—[THE VICE-CHANCELLOR:—Supposing that the daughters are to take, is any question raised as to whether they are to take in succession or as tenants in common?—That question is raised by the exceptions which the daughters have taken to the master's approval of the settlement: and we submit that they must take successively in tail male.

The cases of *Hart v. Middlehurst*(a) and *Oddie v. Woodford*(b) and particularly the latter, show that the word, "issue" must be held to include female as well as male issue, unless there is something in the instrument to show that the testator meant to use that word in a narrower sense. The question then is whether there is anything in this will to cut down the meaning of the word, "issue." It will be said, perhaps, that as the estates are to be held in tail male, they cannot be limited to the daughters; but we have before shown that estates may be limited to daughters in tail male, as well as to sons. No argument upon the point now in discussion can be drawn from the will of the Sussex estates, for the reasons which we have before stated. Indeed that will rather affords an inference in our favor; for by it the testator has limited his Sussex estates to the *sons*, not to the [*126] *issue* of Thomas Brand in tail male: *and, when he

(a) 3 Atk. 371.

(b) 3 Myl. & Cr. 584. See pages 600 and 610.

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alludes to that will in the concluding clause in the will of his Bedfordshire estates, he says that he had thereby devised his Sussex estates to *the issue male*, not *the issue*, of Thomas Brand. It will be said perhaps that the expression used by the testator, is not "issue," simply, but, "issue in tail male," and that that expression denotes the persons on whom the estates are to be settled. But we submit that the word, "issue," denotes the persons, and the words, "in tail male," the nature of the estate or interest which they are to take under the settlement.

The proviso as to taking the name and arms of Trevor, is applicable to daughters as well as to sons.—[THE VICE-CHANCELLOR :—I see that, in this will, reference is made to the person in possession of the estates, becoming entitled to the barony of Dynevor : I must know, therefore, how that barony was held.]—The barony of Dynevor was a barony in tail male, and, therefore, not descendible to females. The barony of Dacre was a barony in fee ; and, therefore, descendible to females as well as males : and the testator says, in his will disposing of his Sussex estates, that, if Thomas Brand or his issue male shall succeed to that barony, the estate of the person so succeeding (provided that there shall be then in existence any other son or the issue male of any other son of Thomas Brand) shall determine in like manner as if the son of Thomas Brand, who or whose issue male shall succeed to that barony, were not only actually dead, but as if there were also an entire failure or extinction of male issue of such son, and thereupon the estates shall go over to the next or other son of Thomas Brand or his issue male to be entitled under the devises aforesaid. But in the will directing a settlement to be made of his Bedfordshire estates, he *says [*127] that those estates are to be settled upon George Rice Trevor for life, with remainder to his issue in tail male in strict settlement, upon condition that all person or persons from time to time to come into possession of those estates, shall, within one year afterwards, take the name and bear the arms of Trevor, and also upon the like condition to that I have made in my will of my Sussex estates, *so far as the change of circumstances will permit*, that the said estate shall go over to the party next entitled,

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on the person for the time being possessed, becoming entitled to the barony of Dynevor. The testator, therefore, makes a distinction between the two baronies. Supposing that the testator had himself limited the estates to George Rice Trevor for life with remainders to his sons and daughters in tail male in strict settlement, there would have been no inconsistency in his inserting a proviso that if the barony of Dynevor should descend to a person entitled to the estates in possession, the estates should go over. It does not at all follow that, because the daughters cannot take the barony of Dynevor, therefore, they are not to take the estates under the word "issue." There is nothing, either in the will of the Sussex estates or in the provisos respecting the taking of the name and arms of Trevor and the descent of the barony of Dynevor, which is at all inconsistent with the Bedfordshire estates being limited to daughters as well as to sons.

In the will of the Sussex estates, the testator speaks of issue *male*; but, in the will of the Bedfordshire estates, those words do not occur; and, moreover, those estates are not given over except "in default of such issue" of George Rice Trevor; and, there being nothing in the will to alter the proper meaning of the word, "issue," we submit that the master was not warranted in excluding the daughters of George Rice Trevor from the limitations of the settlement.

Mr. Romilly cited *Marshall v. Bousfield*.(a)

Mr. Bethell and Mr. Wickens for Mr. Rice Trevor's eldest daughter:—We rely on the plain and natural meaning of the word, "issue." The *onus* of showing that the testator used that word in a different sense, lies entirely on the other side. The master seems to have taken it for granted that the testator intended the course of limitation with respect to his Bedfordshire estates, to be similar to that with respect to his Sussex estates. But there is a very material difference between the two wills. In the will relating to the Sussex estates, all the sons of Henry Brand, ex-

(a) 2 Madd. 166

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cept the eldest, are omitted; and, on failure of issue male of that son, those estates are given to Henry Brand in fee. In the will of the Bedfordshire estates, an intention is manifested that the issue in general of George Rice Trevor should take the estates, in tail male: and if they fail, to whom are those estates to go? Not to George Rice Trevor, but to Henry Brand in fee. Consequently the principle of the master's decision, namely, that there was to be a conformity of settlement with regard to the two estates, entirely fails.

The proviso as to taking the name and arms of Trevor, is applicable to the daughters as well as to the sons; and nothing is more common, in wills and *settlements, [*129] than to direct that daughters and their husbands, as well as sons and their issue, shall take and use the name and arms of the author of the instrument.

It was contended, before the master, that the persons to take, must be those only who are within the line of inheritance to the barony of Dynevor: but we say that the contrary is quite plain; for the testator manifestly intended to prevent his name and estates from being merged in the title and possessions of the barony of Dynevor; and therefore the issue who cannot, by any possibility, inherit the title of Dynevor, ought, rather, to be the more favored objects of the settlement.

It will be said, on the other side, that, in the will of the Bedfordshire estates, the testator did not use the words "issue in tail male," in their proper, legal, technical sense: but, on referring to the will of the Sussex estates, it will be seen that the testator understood the correct meaning and effect of each of those words; and that, wherever he uses the word "issue," for the purpose of describing sons alone, he used that word in connection with the adjective "male;" consequently, when he used it by itself, he meant it to include more than issue of the male sex.

The concluding clause of the will relating to the Bedfordshire estates, which has been so ably commented upon by the Solicitor-
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General, shows that the testator, instead of intending (as the master has supposed) that the will of the Sussex estates should control the settlement to be made of the Bedfordshire estates, meant that the latter should control the former: for he has ex-
 [*130] pressly declared that the settlement of his Sussex *estates, should include such powers, provisions and clauses, *mutatis mutandis*, as were thereinbefore mentioned respecting his Bedfordshire estates. *West v. Errissey*, (a) *Ashton v. Ashton*, (b) *Martin and Davidson on Conveyancing*. (c)

Mr. *Daniell*, for the four youngest daughters of George Rice Trevor, said that the proviso with respect to taking the name and arms of Trevor, was differently expressed in the two wills; that, in the will of the Sussex estates, it commenced thus: "provided that *every person* who, under the devises aforesaid, may come into the possession of the said devised estates," &c.: but in the will of the Bedfordshire estates, the proviso began as follows: "Upon condition that all person or *persons*, from time to time to come into possession of the said settled estates;" which showed that the testator contemplated that more persons than one might, at the same time, become entitled, in possession, to his Bedfordshire estates.

THE VICE-CHANCELLOR:—It seems to me that the principal question for my consideration, is whether the words "in tail male," are descriptive of the persons who are to take, or of the inheritance which the takers are to have.

Mr. *Stuart*, Mr. *L. Wigram* and Mr. *Hodgson*, for Henry Trevor, late Henry Brand:—We submit that the settlement which the master has approved of, is a proper execution of the trust created by the will of the Bedfordshire estates.

[*131] *The word "issue," standing by itself, does not mean sons and daughters only, but comprehends sons and daughters and all their descendants, both male and female. When

(a) 2 P. W. 349; and 3 Bro. P. C. 327; see p. 335, 1st ed.

(b) 1 Harg. Col. Jur. 402.

(c) Vol. IV, p. 609, note, as to the meaning of the term "strict settlement."

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the words, "in tail male," are added to the word, "issue," the meaning of that word is confined to sons and their male descendants. If the testator had devised his Bedfordshire estates, directly, to George Rice Trevor for life, with remainder to his issue in tail male, then that gentleman would have taken an estate in tail male. The devise, however, is executory, and the words "in strict settlement" are added to it: therefore, George Rice Trevor, instead of being tenant in tail male, has been properly made tenant for life; and his issue of the description pointed out, instead of taking by descent from him, must take as purchasers upon his decease, that is, the estates must be settled on George Rice Trevor for life, with remainders to his sons successively in tail male: and that is the mode of limitation adopted by the master. According to the argument in support of the exceptions, the words "issue in tail male," comprise females as well as males in the first generation, but males only in the subsequent generations. According to our construction, those words have the same meaning throughout; that is, they mean issue male in all the subsequent generations, as well as in the first.—[THE VICE-CHANCELLOR:—If sons are to take in tail male under the words "issue in tail male," why are not daughters to take in tail male under those words?—Because the words "in tail male" apply to the issue.—[THE VICE-CHANCELLOR:—The words "in tail male" are a qualification of the inheritance which the takers are to have: you construe the words "with remainder to his issue in tail male," as if they were "with remainder to his issue male."—Yes; because a devise to A. in tail male, gives A. an estate in tail male.

*It was said, by the counsel in support of the exceptions, that, in construing the will of the Bedfordshire estates, we are to have regard to the will of the Sussex estates; but, when we look at that latter will, we find that, under it, daughters could not, by any possibility, take.

[THE VICE-CHANCELLOR:—The testator, in that will, has passed over all the sons of Henry Brand, except the eldest.]

Nothing can show, more plainly, that the testator intended no-

body to take under the settlement which he directed to be made, except a person who might become entitled to the barony of Dyn-evor, than the direction that the estates should go over on the person for the time being possessed of them, becoming entitled to that barony; and we know that no female whatever could become entitled to that barony. The power to portion younger children, also shows how little daughters were in the testator's contemplation.—[THE VICE-CHANCELLOR:—As the eldest son was to be tenant in tail male, and the younger children were to take in remainder only, it was reasonable to give, to the father, a power of portioning his younger children.]

Mr. *Hodgson*.:—Many of the cases that have been cited in support of the exceptions, arose upon marriage articles: but such cases are not much in point where the question arises on a will; for, to use the language of Sir William Grant, in *Blackburn v.*

Stables,^(a) the object and purpose of marriage articles, [*133] furnish an indication of *intention which must be wanting in wills. All persons who take under a will are volunteers; but, under marriage articles, the issue are purchasers: they are the principal objects of the articles, and they are the persons in whose favor the articles are to be construed. So that, if the words are large enough to include all the children, they must all take. But, when you have to put a construction on a will, you have no such grounds to go upon; you must be guided by the words, taken in connection with the other parts of the will; and, if the context does not show that the testator intended the words to have any other than their ordinary and correct meaning, the court will not give them a more extensive operation.

In this case the testator has directed his Bedfordshire estates to be settled on George Rice Trevor for life, without impeachment of waste or spoliation, with remainder to his issue in tail male in strict settlement. Now, what I collect from that direction is, that the testator meant the estates to be settled on George Rice Trevor in tail male, in the way of strict settlement; that is,

(a) 2 Ves. & Beam. 369.

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he was to take for life, and his issue in tail male were to take as purchasers. The words "issue in tail male" mean such issue as will take under a limitation in tail male either existing or to be created, and, if they are to take in strict settlement, they must take as purchasers. *The Duke of Devonshire v. Cavendish*,^(a) *Douglas v. Congreve*.^(b)

The testator, after directing that the estates shall go over, on the person in possession becoming entitled to the barony of Dynevor, says: "and, in default of *such* issue of the said George Rice, I devise my said Bedfordshire *estate unto [*184] the said Henry Brand, his heirs and assigns forever;" that is, such issue as might succeed to the barony of Dynevor. If the testator had intended to provide for *all* the issue of George Rice Trevor, he would not have given the estates to Henry Brand, except in case George Rice Trevor should die without issue generally.

The *Solicitor-General* in reply:—The word "issue," in this case, means, not all the descendants of George Rice Trevor, however remote, but his descendants who are to take the estates as purchasers after his death; and the words "in tail male," describe the interest which they are to take. It is perfectly true that, if the estates had been devised, directly, to George Rice Trevor for life, with remainder to his issue in tail male, he would have taken an estate in tail male: but the trust in this case is executory; and it is quite contrary to the principles of this court, to construe an executory trust in the same way as it would construe an executed devise. Where an estate is devised to A. for life, with remainder to his issue in tail male, the words "in tail male" are held to apply to the party himself. But, in this case, the estates are to be settled on G. R. Trevor for life, without impeachment of waste, with remainder to his issue in tail male. To whom then do the words "in tail male" apply? Not to Mr. Trevor, but to his issue, who are to take as purchasers on the determination of his life estate. According to the argument in support of the report, both the persons who are to take and

^(a) 4 T. R. 741, note.^(b) 1 Beav. 59.

the estate which they are to take, are described by the same words.

I will now proceed to make a few observations on that [*185] clause in the will which has reference to the estates *going over on the person in possession succeeding to the barony of Dynevor. The testator says: "And also upon the like condition to that I have made in my will of my Sussex estate, so far as the change of circumstances will permit, that the said estate shall go over, &c." Now, supposing that the daughters were not to take the Bedfordshire estates, there would be no change of circumstances whatever, as regards the title and the estates. For the sons of T. Brand were, all of them, in the line of succession to the barony of Dacre; and the sons of George Rice Trevor were, all of them, in the line of succession to the barony of Dynevor. But if the Bedfordshire estates were to go to the daughters of G. R. Trevor, that is, to persons who could not succeed to the barony of Dynevor, then a change of circumstances would take place.

The two wills were made at very nearly the same time; and the will of the Bedfordshire estates refers to the will of the Sussex estates. In the latter we find that the testator repeatedly uses the words "issue male," not "issue" by itself; but, in the former, he uses the word "issue" simply. Again, in the will of the Sussex estates, the person in possession of them is always spoken of as a male and in the singular number; but, in the corresponding parts of the will of the Bedfordshire estates, the term "persons" is used, as well as "person," and there is nothing to denote the sex of the person or persons. Why did the testator use these different expressions in his two wills, which were so nearly contemporaneous with each other, if he meant issue of the same description to take under both of them?

The word "issue," is a word of purchase: it describes the persons who are to take, as purchasers, on the determination [*186] of G. R. Trevor's life estate; and, therefore, it must be confined to issue in the first generation, that is,

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to sons and daughters: and the words "in tail male," describe the estate which the issue are to take.

THE VICE-CHANCELLOR:—Before I decide the question raised by this first exception, I must consider, attentively, the language of the instrument on which it has arisen.

The question raised by the second exception taken by George Rice Trevor, were whether the power of jointuring ought not to have enabled him to charge the estates with a rent charge, the amount of which was not to vary as the rents varied, but was to be fixed at one-fifth of the rental *at the time of exercising the power*; and whether the jointure was to be subject to or free from any deduction on account of the expenses of managing the estates, repairs, &c.(a)

The *Solicitor-General* and Mr. *Romilly* in support of the exception.

Mr. *Stuart*, Mr. *L. Wigram* and Mr. *Hodgson*, *contra*.

THE VICE-CHANCELLOR:—I do think that the testator meant that the jointure should vary in amount, *de anno in annum*; for he says, in his will, that the jointure shall not exceed in *amount one-fifth of the then annual rental of the [*137] estates, that is, the annual rental at the time of appointing the jointure. The word "ordinary," which is used in the will and which the master has inserted in the draft of the settlement, seems to me to have no distinct meaning, and, therefore, I shall reject it. I think that the "rental" must be taken to be the amount which is receivable by the landlord by way of rent, after the deductions which tenants are entitled to make. The word "clear," however, ought to be inserted in order to avoid

(a) It is laid down in Sir Edw. Sugden's Treat. on Pow., Vol. II, p. 315, 6th edition, that a general power to jointure to a particular amount, without expressing that it shall be clear of taxes, will only enable an appointment of the jointure subject to natural out-goings; as parochial payments, repairs, &c. See the three following pages of the same work.

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any question: and then the power to jointure will stand thus: "any clear annual sum or yearly rent charge, not exceeding in amount, for any such wife, one-fifth part of the annual rent payable at the time of making the limitation or appointment."

July 25th.—THE VICE-CHANCELLOR:—The question raised by the first exception taken by each of the three sets of exceptants in this case, depends entirely on the meaning of the words "in tail male."

The testator devised all his Bedfordshire estates to certain persons, upon trust that they should settle and convey the same to the use of or in trust for George Rice, for life, without impeachment of waste except permissive waste or spoliation, with remainder to his issue in tail male, in strict settlement. I agree with Mr. Hodgson that the words, "in strict settlement," are to be referred to the mode in which the first taker is to take, and that they have no effect whatever on the limitations which are to be made to those who are to take after him. The settlement would be equally a strict settlement, whatever might be the form of limitation to the issue of the first taker. Those words mean merely that the limitation of the estate to the first taker [*138] *shall not be such as to enable him to disappoint the obvious intention of the settler or testator, that the children of the first taker should take after him; and, therefore, the mode was introduced of either strictly tying down the first taker to an estate for life, or giving him an estate for ninety-nine years, if he should so long live; and, if he took an estate of freehold, of limiting the estate to trustees in trust to preserve contingent remainders during his life.

Then the expression, in this case, being to George Rice for life, with remainder to his issue in tail male in strict settlement, it is plain that the estate to be taken is an estate in tail male. The only question then is, who are to take? The answer is, the issue.

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That the words, "in tail male," or, "in fee simple," or words of that description, do not describe the taker, but describe only the estate which the taker is to have, appears to me to be manifest to anybody who will consider the language which is used by Littleton. In his first section he says, "Tenant in fee simple is he who has lands and tenements to hold to him and his heirs forever:" and then, in his 13th section, after having said that tenant in tail is by force of the statute of Westminster 2d, cap. 1, he says, "that tenant in tail is in two manners; that is to say, tenant in tail general, and tenant in tail special." In his next section he proceeds to state what a tenant in tail general is; and he says, "tenant in tail general is where lands are given to a man and to his heirs of his body begotten." Then, in his 16th section, he says, "a tenant in tail special is where lands are given to a man and his wife, and to the heirs of their two bodies."

It seems to me, therefore, that the language of the law is perfectly clear, and has a defined meaning; and that the words "in tail male," no otherwise describe the *inter- [*139] est or estate which those descended from the issue are to have, than as they describe the interest which, in the first instance, the issue themselves are to take: for the subsequent takers will take by descent and not by purchase. And it is quite clear that, if you name the first takers, and then describe the estate which they are to have, it will be by virtue of that estate that the issue descended from them, will take. In that sense it may be said that the words do describe the persons who are to take; but those words do not describe the persons who, in the first instance are to take that estate which is to descend to heirs of a particular description.

Now, upon the words, as they stand by themselves, it is clear to my mind that the testator meant that estates in tail male should be limited to those who were to take immediately in remainder after the tenant for life; and that that is his meaning, is confirmed by adverting to the circumstance, namely, that, in the first will which he has made, that is the will of the Sussex estates, when he has occasion to speak of issue male, he uses those

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very words. Therefore, if he had meant that the issue of the first taker of the Bedfordshire estates, should be the issue male, I must suppose that he would have said so. Instead of which he has cautiously abstained from using the language which is found in the first will, and has used language in the second will, which, in my opinion, does clearly show that the parties who are to take in remainder after the tenant for life, are the issue generally, that is the children of Mr. Rice Trevor. Therefore, the first in each of the three sets of exceptions, must be allowed: and I shall therefore declare that, according to the true construction of the second will, the persons who are to take in remainder after George Rice Trevor, are his children.

[*140] *The mode in which they are to take, will be for subsequent consideration.

Mr. *Bethell* and Mr. *Wickens* in support of the first exception taken by Frances Emily Trevor:—The court, in carrying the testator's directions into effect, ought to follow the same rule with respect to daughters as exists with regard to sons; that is, it ought to limit the estates to the first and other daughters, successively, in tail male. We have not been able to find any case in which the point now under consideration has been determined. There is nothing except the expression in the judgment in *Hart v. Middlehurst*,^(a) which has any bearing on it: and there, Lord Hardwicke seems to intimate that the same mode of limitation should be adopted with regard to daughters, as with regard to sons: and that seems to us to be consonant to the intention of the testator, as it is to be collected, from the general scope and tenor of his will. His general intention seems to have been, to found a family of opulence and consequence in Bedfordshire, and to perpetuate the name of Trevor in that county: and that intention will be defeated unless his estates in that county are preserved entire. One can hardly suppose that the testator could have intended that his estates should be parcelled out amongst five or more proprietors, each of whom was to bear the name and

(a) 3 Atk. 371.

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arms of Trevor. The consequence of which would be that the importance of the family would be materially impaired. Moreover, it is quite clear that the testator intended his estate to go over whole and entire.

*The expression, "strict settlement," means two [*141] things: first, that the parent should be made tenant for life, and, next, that his children should take in succession to each other.

It may be said, perhaps, that the testator has contemplated the possibility of a plurality of persons coming into possession of his estates, and that that cannot happen unless the daughters take as tenants in common. But the truth is that no argument can be derived from the loose language of a will like this, which merely points out, in general words, what is to be done in a more exact and formal manner, at some future time; and then the testator's general purpose and intention must be the guide.

Mr. *Daniell* appeared for the younger daughters; but—

The VICE-CHANCELLOR, without hearing him, said:—The clause as to taking the name and arms of Trevor, points to the case of several persons, as well as to the case of a single person coming into possession of the estates: and, therefore, it is applicable to the case of the daughters coming into possession, collectively. And, in my opinion, that clause cannot be considered as pointing to the case of one of the daughters, and her husband coming into possession; because the testator says: "And also upon the like condition to that I have made in my will of my Sussex estate, so far as the change of circumstances will permit, that the said estate shall go over to the party next entitled, on the person for the time being possessed becoming entitled to the barony of Dynevor." So that he refers to what he had done by his will of the Sussex estates. And there we find that, *in case any person becoming entitled in possession to [*142] those estates, shall neglect, refuse, or discontinue to take and use the name and arms of Trevor, the estate of that person is

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to cease, if a tenant for life, as if he were then actually dead, and, if a tenant in tail, as if he were actually dead and there were also an utter extinction or failure of his issue male, or of the issue male of the ancestor through whom he acquired his estate tail.^(a) That clause seems to me to exclude the notion of the word, "persons," being applicable to a daughter and her husband; and, consequently, the inference that the word "persons" applies to daughters taking collectively, remains in full force.

Besides, in limiting estates in strict settlement, it is more usual to limit them to daughters as tenants in common, than in succession.

Mr. *Bethell*:—Your Honor's decision upon that exception disposes, in effect, of all the exceptions taken by the daughters, except that which relates to the taking of the name and arms.

The *Solicitor-General* and Mr. *Romilly*, in support of G. R. Trevor's fourth exception:—This exception applies to the clause which directs that the Bedfordshire estates shall go over, on the party in possession of them succeeding to the barony of Dynevor.

The master has framed that clause so that it applies to [*143] *George Rice Trevor, as well as to his issue male, succeeding to the barony. We contend that it ought not to have included George Rice Trevor.

Your Honor will observe that there is a difference between the limitations of the two estates, and the parties stood somewhat in a different position. Henry Brand, who was the first tenant for life of the Sussex estates, was the heir presumptive to the barony of Dacre; and, therefore, he might or might not succeed to it. But Mr. Rice Trevor was the heir apparent to the barony of Dynevor, and, consequently, on the death of his father, he

(a) It is submitted that the clause in the will of the Sussex estates, to which the testator referred, was not the clause relating to the taking of the name and arms, but that relating to succession to the barony of Dacre.

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would, of necessity, succeed to that barony. The question, therefore, is whether the testator, from the different wording of his will, did not mean differently as to the going over of the two estates. The Sussex estates were devised to Henry Brand for life, or until he should become Baron Dacre, with remainder to Thomas Brand for life, or until he should become Baron Dacre. But the Bedfordshire estates are given to Mr. Rice Trevor for life: "upon the like condition to that I have made in my will of my Sussex estate, so far as the change of circumstances will permit, that the said estate shall go over to the party next entitled, on the person for the time being possessed, becoming entitled to the barony of Dynevor." Now the shifting clause in the will of the Sussex estates, is confined, altogether, to the issue in tail: and we submit that, there being no limitation of the Bedfordshire estates to Mr. Rice Trevor for life, or until he shall become Lord Dynevor, but there being an absolute limitation to him for life, the shifting clause that is to be introduced into the settlement of those estates, ought to be framed similarly to the shifting clause of the Sussex estates; and then it will not apply to Mr. Rice Trevor, the tenant *for life, but [*144] will be confined to his issue in tail; as it ought to be, in order to make it correspond (as the testator has directed that it shall do) with the shifting clause of the Sussex estates. •

THE VICE-CHANCELLOR:—I do not think that that is the true construction of the will. Because, after having limited the Bedfordshire estates to G. Rice Trevor for life, with remainder to his issue in tail male, in strict settlement, the testator says: "Upon the like condition to that I have made in my will of my Sussex estates, so far as the change of circumstances will permit, that the said estate shall go over to the party next entitled, on the person for the time being possessed, becoming entitled to the barony of Dynevor." Now the very form of limitation which the testator has adopted with regard to his Sussex estates, is tantamount to a condition: for it is, in effect, a limitation to Henry Brand for life, upon condition that, if he succeeds to the barony of Dacre, his life estate shall cease and the estates shall go to his son, Thomas Brand, for life, but subject to the like condition.

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It is more shortly expressed, I admit; but it is equally a conditional limitation.

It was the plain intention of the testator that no taker of his Bedfordshire estates, should hold those estates and the barony of Dynevor together; and, therefore, the master ought to have followed the precedent furnished him by the will of the Sussex estates, that is, he ought to have limited the Bedfordshire estates to G. R. Trevor for life, or until he shall become Baron Dynevor; and then the shifting clause, like the shifting clause in the will of the Sussex estates, need not include the tenant for life.

[*145] *The *Solicitor-General* and Mr. *Romilly*:—We have another objection to make to the shifting clause.

If Mr. Rice Trevor should have a son and no other child, and that son should succeed to the barony of Dynevor, the estates (as the shifting clause now stands) will go to Henry Brand in fee: but, according to the shifting clause in the will of the Sussex estates, those estates are not to shift at all, unless there shall be in existence, at the time, another son or the issue male of another son of Thomas Brand.—[THE VICE-CHANCELLOR:—What I understand to be the effect of the shifting clause in the will of the Sussex estates, is, that if, at the time when the barony of Dacre descends upon any issue male of Thomas Brand, any other issue male of that gentleman, is or are in existence, the vesting in possession of the ultimate limitation to Henry Brand in fee, is not then to take place.]

Mr. *Stuart* and Mr. *L. Wigram*:—There is this difference between the will of the Sussex estates, and the will of the Bedfordshire estates. Under the former, the daughters of the tenant for life take no interest whatever; but your Honor has decided that, under the latter, the daughters of the tenant for life, do take interest. Besides, there is a great difference between the scheme of limitation in the two wills. In the will of the Sussex estates, the tenant for life and the ultimate remainder-man are the same person; and, therefore, the testator did not intend

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those estates to go back to the tenant for life, so long as any issue male should be in existence. But, in the will of the Bedfordshire estates, the tenant for life and the ultimate remainderman in fee, are different persons; and, therefore, the same reason does not apply to them. And the *testator [*146] has said: "so far as the change of circumstances will permit:" which points to the difference of circumstances that exist between the limitations of the two estates.

Mr. Hodgson.:—The distinction between the two shifting clauses, arises from the difference that exists between the barony of Dacre and the barony of Dynevor. The former is descendible to females as well as males; the latter is descendible to males only. Thomas Brand may have two sons. The eldest son may die leaving a daughter only; then that daughter will become Baroness Dacre; but her uncle will be Thomas Brand's heir in tail male; and the testator framed the shifting clause in the manner in which we find it in his will relating to the Sussex estates, in order to keep those estates in the male line of Thomas Brand, notwithstanding the descent of the barony upon one of that gentleman's issue. But the barony of Dynevor cannot descend to a daughter of an elder son of George Rice Trevor: and that is the reason why the shifting clause in the will of the Bedfordshire estates, is framed differently from the shifting clause in the will of the Sussex estates.

THE VICE-CHANCELLOR.:—Your argument is founded on an assumption of a reason for what the testator did: but I am not at all satisfied that what you assume to be the reason for framing the shifting clause as we find it in the will of the Sussex estates, is the real reason.

It seems to me that the testator has expressly provided that there shall not be a disunion of the Sussex estates from the barony of Dacre, unless, in the event of there being some other person capable of inheriting *those estates in tail male [*147] after the barony has descended upon the person in possession; in order, as I understand, and as the words themselves imply, that the descent of the barony of Dacre shall not have the

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effect of accelerating, to Henry Brand, the remainder in fee; but that, in the event of there being no other male issue capable of taking the estates after the barony has descended, the barony and the estates may go together as far as they can.

It is observable that there is a sort of reciprocal quality affecting both the estates. The Sussex estates are limited, so that sons and their issue male can alone take; but the barony of Dacre is capable of descending to females as well as to males. The Bedfordshire estates are so limited as, that sons as well as daughters and their issue male, may take: but the barony of Dynevor can descend only to sons and their issue male. Then, if there should be no daughters or issue male of daughters, and the barony of Dynevor should descend upon a tenant in tail male, being a son of George Rice Trevor, or some of his issue, the descent of the barony (supposing the clause to stand as you say it ought to do,) would deprive the party in possession of his estate.

Now I apprehend that the testator meant the same thing to take place with respect to the Bedfordshire estates, as with respect to the Sussex estates, namely, that in the event of the barony of Dynevor descending on a son of George Rice Trevor, or the issue male of a son, he should continue to hold the Bedfordshire estates, unless there was some person capable, under the limitations previously expressed in the instrument, of taking [*148] those estates in the way of taking them in *remainder; in order to prevent the acceleration of the fee, in possession, to Henry Brand. Therefore, as far as that part of the exception is concerned, it is right.

The *Solicitor-General* and Mr. *Romilly* for George Rice Trevor, abandoned the exception taken by their client, to the proviso as to taking the name and arms of Trevor; but concurred with Mr. *Bethell*, Mr. *Wickens* and Mr. *Daniell* in supporting the exception taken to that proviso by the daughters of G. R. Trevor.

The clause in the will of the Bedfordshire estates, respecting

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the taking of the name and arms, is in very general terms: it says, merely, that all persons from time to time to come into possession of the estates, shall, within a year afterwards, take the name and bear the arms of Trevor. The clause in the will of the Sussex estates is more stringent: but your Honor will bear in mind that it is the will of the Bedfordshire estates, that is to be the guide in making the settlement of the Sussex estates, and not *vice versa*. The proviso introduced by the master, directs that every person who shall come into possession of the estates, shall, within a year afterwards, take and use the name and arms of Trevor; and that, if he refuses, neglects or discontinues so to do, the estates shall go over as if he were dead, and, in the case of his being a son or the issue male of a son of G. R. Trevor, as if there were a total failure of the issue male of such son: so that, if Mr. Rice Trevor were to have a son, and that son were to have two or more sons, and the eldest of them were to refuse or discontinue to use the name and arms, the estates would go away, not only from him and his issue male, but *from [*149] all his brothers and sisters, (if he had any,) and all their issue male: but that never could have been intended by the testator. The proviso which we propose to substitute for the one which the master has approved of, confines the consequence of refusing or discontinuing to take and use the name and arms, to the defaulter and his issue male.

Mr. Stuart, Mr. L. Wigram and Mr. Hodgson, for Henry Trevor, (late Brand):—The common mode of carrying into effect a direction, in an executory will, as to taking the name and arms of the testator, is to say that the estate of the party who refuses, shall cease.—[THE VICE-CHANCELLOR:—That is not denied.]—If that is conceded, it is all we ask. If, in the case put by the *Solicitor-General*, the eldest grandson refuses to comply with the direction, all that we say is, that his estate is to cease. But then we must not lose sight of the point that the party who so refuses, has in him, at that time, the whole estate tail: and his brother has got no more interest in the estate, than any of his children or issue have. On what possible ground then, can it be contended that the estate is to be taken away from the issue of the eldest grand-

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son, and not from his brother? He does not take the estate by purchase, but by descent. If he were the purchaser, the estate he holds would wholly cease, and all his issue male would be excluded: and then his brother, being the next remainder-man, would take. The way in which directions like the one in question are always carried into effect, is to say that the estate which is in the party who refuses, shall cease.

Mr. Hodgson.:—The proviso inserted by the master, is in accordance with the proviso, for the like purpose, which the testator has, himself, introduced into his will of the Sussex estates: [*150] and it could not be expressed in any other manner, without violating the rules of law. It could not be framed so as to divest the estates from the eldest grandson and his issue, and to vest them in his brother. For the estate which issue in tail or in tail male take, is the estate of the ancestor from whom the estate in tail or in tail male was originally derived. The issue do not take as the issue of their immediate ancestor; and the proviso must determine the estate tail to the same extent as it would be determined if there were an entire failure of issue to inherit the estate tail of which the defaulting party was seised: (a) and that is what the testator has done with regard to his Sussex estates.

THE VICE-CHANCELLOR.:—My notion is, that this condition has no reference to the Sussex estates, and, therefore, is not to be construed with reference to the Sussex estates. Where the testator did mean to refer to the limitations of the Sussex estates, he has done so, in express terms, in the next proviso. Therefore, I do not see why this clause should be so expressed, as to produce the effect of making to cease the estate of a person who happens only to be a brother or collateral relation of the offending party.

July 27th.—The order made was, in substance, as follows: This court doth declare, upon the first exception taken by each

(a) *Harg. & But. Co. Litt.* 327 a, note 2, and *Ferne on Remainders*, 254, note (e), 9th edit.

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of the excepting parties, that, immediately after the limitation to the first and other sons of G. R. Trevor, successively in tail male, there ought to be inserted, in the draft settlement, a limitation to all the daughters as tenants in common in tail, with cross remainders *between them in tail: And the court al- [*151] lowed the third exception of G. R. Trevor, and the third exception of his eldest daughter, and the second exception of his younger daughters; and, upon his fourth exception, it declared that the limitation to him ought to have been a limitation to him and his assigns, for life, or until he should succeed to the barony of Dynevor, without impeachment of waste, except as is mentioned in the draft; and that the limitations and the other provisions having reference to the determination of his estate, should have been made applicable to his succeeding to the barony in like manner as to his death: And the court declared that, in lieu of the proviso in the draft, and which was set forth in his fourth exception, a proviso ought to have been inserted to the following effect: that, in case the barony of Dynevor should descend to any child of G. R. Trevor thereby made tenant in tail male, or upon any issue male of any such child, the use for the benefit of such child or issue male, (provided that there should be then in existence any other child or the issue male of any other child of G. R. Trevor, capable of taking or inheriting the estates under the limitations,) should cease, as if the child who or whose issue male should succeed to the barony, were not only dead, but as if there were also an utter failure or extinction of the male issue of such child, and that the estates should thereupon go to the person or persons next beneficially entitled in remainder under the limitations, in the same manner as if the child were not only dead, but as if there were also an utter failure or extinction of the child's male issue: And the court allowed the third exception of the daughters: and it allowed G. R. Trevor's second exception, with the following variation of the clause thereby proposed to be inserted in the draft, namely, in lieu of the words: "the then *ordinary, annual rental of the estates," the words: "the [*152] annual rent payable at the time of making the limitation or appointment," to be inserted: And the court referred it back to the master, to review his report, and to revise and resettle the

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draft settlement, having regard to the declarations and directions thereinbefore contained.(a)

(a) Henry Trevor (late Brand) has appealed to the House of Lords, from the above order, except, so far as it allowed the third exception, taken by the daughters of G. Rice Trevor, relating to the name and arms clause in the draft settlement. Probably, he omitted that part of the order in his appeal, because the clause might be barred on the first tenant in tail male coming of age. It will be seen, however, on referring to Mr. Butler's note to Co. Litt. 327 a, and to the precedents of settlements and wills published by Bythewood & Jarman, and Martin & Davidson, that it is the practice of conveyancers so to frame clauses for the like purpose, as to defeat the entire estate tail of which the non-complying party was seized, and to give the property over to the party next entitled in remainder, under the limitations contained in the instrument.

The reason stated, in the printed appeal case, from appealing from the allowance of Geo. Rice Trevor's second exception, relating to the power to jointure, was: "that the yearly sum to be appointed, ought to be subject to the land tax, or, in other words, that the out-goings should be taken out of the gross rental, before the division takes place to ascertain the amount of the jointure." It is submitted that his Honor's judgment on the second exception, was to that effect. What the reporter understood his Honor to say, was, in substance, that the word "rental" ought not to be inserted in the order, because it meant the gross amount of the rents which the tenants were liable to pay; and that the word "rent" ought to be substituted for it, in order to express that the jointure ought not to exceed one-fifth of the amount receivable, by the landlord, in the way of rent, after the deductions usually made by tenants, & a. it is presumed, for land tax, quit rents, and other payments usually borne by landlords.

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IN THE HOUSE OF LORDS.

FROM THE COURT OF EXCHEQUER IN SCOTLAND.

*JOHN THOMSON, ESQ., ATTORNEY FOR THE EXECUTORS [*153]
OF JOHN GRANT, LATE OF DEMERARA, DECEASED,
Plaintiff in Error; HER MAJESTY'S ADVOCATE-GENERAL,
Defendant in Error.(a)

Legacy Duty.—Domicil.

1842: July. 1845: 17th and 18th February.

A native of Scotland died domiciled in Demerara, having personal property in Scotland, and having left legacies to persons in that country. Held that the legacies were not liable to legacy duty.

THE late John Grant, Esq., a native of Scotland, died domiciled in Demerara, leaving funds in the Royal Bank of Scotland. By his testament, he nominated executors resident in Demerara, and left certain legacies to parties in Scotland, and the residue of his estate to others residing in the colony. The executors appointed Mr. Thomson, their attorney in this country, to administer the Scotch estate, who, accordingly, took out confirmation or probate of the will in the usual form, and paid part of the legacies. A claim was made on the part of the crown, for legacy and residue duty out of this estate, in respect of its having been property situated in Scotland, belonging to a British subject, and there administered and distributed. This claim was resisted by

(a) The reporter is indebted to Mr. Anderson for the above report. It confirms the principle upon which *The Commissioners of Charitable Donations and Bequests in Ireland v. Devereux* (ante, p. 14) was decided: but the judgment of the House of Lords was not pronounced until after that case had been sent to press; and, therefore, it could not be inserted in a note to that case.

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Mr. Thomson, on the ground that as the law of the testator's domicile at the time of his death, ruled the [*154] *succession, the liability of personal estate to legacy duty was governed by that law; and that no legacy or residue duty was due by the law of Demerara.

In the Exchequer Court of Scotland, the case was decided in favor of the crown, but was carried by writ of error to the House of Lords.

The cause was argued at great length, before the House of Lords, in July, 1842, by Mr. *Pemberton* and Mr. *Anderson*, for the plaintiff in error, and the Solicitor-General (*Follett*) and Mr. *Crompton* on the part of the crown. For the plaintiff in error it was contended that the language of the statute imposing the duty: "every legacy given by any will, of any person," &c., must receive some limitation, and that the domicile of the party was the only sound criterion that could be applied; that the circumstance of the debt being owing from persons in this country, was immaterial, as debts follow the person of the creditor and not of the debtor; besides, the debtor may be sued wherever he is found. Neither could the administration of the will in this country, furnish the rule: the tax on administration is otherwise provided for by probate duty. Further, making administration the test, would be in opposition to the intent of the statute, by which the duty is imposed as a tax on *succession*, irrespective altogether of administration. Moreover, it would in that case, depend upon the will or caprice of the debtor whether duty would be exigible or not; as he might, and it would be his duty to remit to the executors abroad, and thereby supersede the necessity of administering the will in this country. On the other hand, if the testator's domicile were adopted, it furnished a solid and unerring rule for resolving all such questions; and [*155] accordingly it had *been more or less given effect to in the recent cases which had occurred.

For the crown, it was contended that domicile had nothing to do with the question; that legacy duty was a fiscal regulation,

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and was chargeable wherever any person in Great Britain took upon himself the administration or execution of a will in a representative character.

Before the arguments were concluded, the Lord Chancellor observed that the question involved in the case was of very great importance in its operation, and that it would be desirable to have the opinions of the judges. Lords Brougham and Campbell concurred in this suggestion, and the house accordingly appointed the cause to be re-argued by one counsel on each side; and the judges to attend.

The hearing commenced on Monday, the 17th of February, 1845, when Mr. *Fitzroy Kelley*, opened for Mr. *Thomson*, the plaintiff in error. On Tuesday, the Solicitor-General (*Thesiger*) was heard in answer; after which, without calling on the plaintiff in error to reply, the Lord Chancellor put the following question to the judges:—"A. B., a British subject born in England, resided in a British colony, made his will and died domiciled there. At the time of his death, debts were owing to him in England: his executor in England collected those debts, and, out of the money so collected, he paid legacies to certain legatees in England: are such legacies liable to the payment of the legacy duty?" His Lordship framed the question in this form, because the statute equally affected England and Scotland.

*The judges requested a short time to consider their [*156] answer. They retired for this purpose, and, at the end of about an hour, returned, when—

The Lord Chief Justice Tindal delivered the unanimous opinion of the judges, in the following terms:—"The question which your Lordships have put to her Majesty's judges is this: "A. B., a British subject, born in England, resided in a British colony: he made his will and died domiciled there. At the time of his death he had debts owing to him in England: his executor in England collected those debts, and, out of the money so collected, paid legacies to certain legatees in England. The question is: are such legacies liable to the payment of legacy duty?"

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In answer to this question, I have the honor to inform your Lordships, that it is the opinion of all the judges who have heard this case argued, that such legacies are not liable to the payment of legacy duty.

It is admitted, in all the decided cases, that the very general words of the statute: "every legacy given by any will or testamentary instrument of any person," must of necessity, receive *some* limitation in their application; for they cannot, in reason, extend to every person everywhere, whether subjects of this kingdom or foreigners, and whether at the time of their death, domiciled within the realm or abroad; and, as your Lordships' question applies only to legacies out of personal estate strictly and properly so called, we think such necessary limitation is that the statute does not extend to the wills of persons, at the time of their death, domiciled out of Great Britain, whether the [*157] *assets are locally situated within England or not; for we cannot consider that any distinction can be properly made between debts due to the testator from persons resident in the country in which the testator is domiciled at the time of his death, and debts due to him from debtors resident in another and different country; but that all such debts do equally form part of the personal property of the testator or intestate, and must all follow the same rule, namely, the law of the domicile of the testator or intestate.

And such principle, we think, may be extracted from all the latter decided cases, though sometimes attempts have been made, perhaps ineffectually, to reconcile with them the earlier decisions. There is no distinction whatever between the case proposed to us and that decided in the House of Lords, *The Attorney-General v. Jackson*,^(a) or *The Attorney-General v. Forbes*,^(b) except the circumstance that, in the present question, the personal property is assumed to be, for the purposes of the probate, locally situated in England at the time of the testator's death; but that circumstance was held to be immaterial in the case *In re Ewin*,^(c) where

(a) 8 Bligh, 15.

(c) 1 Crom. & Jerv. 151.

(b) *S. C.*, 2 Cl. & Fin. 48.

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it was decided that a British subject, dying domiciled in England, legacy duty was payable on his property in the funds of Russia, France, Austria and America.

And again, in the case of *Arnold v. Arnold*,^(a) where the testator, a natural born Englishman, but domiciled in India, died there, it was held by Lord Cottenham that the legacy duty was not payable upon the legacies *under his will, [*158] his Lordship adding: "It is fortunate that this question, which has been so long afloat, is now finally settled by an authoritative decision of the House of Lords."

And as to the argument at your Lordships' bar, on the part of the crown, that the proper distinction was whether the estate was administered by a person in a representative character in this country, and that, in case of such administering, the legacy duty was payable, we think it is a sufficient answer thereto, that the liability to legacy duty does not depend on the act of the executor in proving the will in this country, or upon his administering here; the question, as it appears to us, not being whether there be administration in England or not, but whether the will and legacy be a will and legacy within the meaning of the statute imposing the duty.

For these reason, we think the legacies described in your Lordships' question are not liable to the payment of legacy duty.

In giving judgment, the LORD CHANCELLOR spoke as follows:—My Lords, in consequence of something that was thrown out at your Lordships' bar, I think it proper to state that it was not from any serious doubt or difficulty which we considered to be inherent in this question in the former argument, that we thought it right to ask the opinion of the judges, but it was on account of its extensive nature, and because the question applied only to Scotland in the form in which it was presented to your Lordships' House; whereas, in reality and in substance, it applies to the entire kingdom, not only to *Great [*159] Britain, but, in substance, to Ireland, and to all the

(a) 2 Myl. & Keen, 365, and 2 Myl. & Cr. 256.

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British possessions. We thought it right, therefore, in consequence of the extensive nature and operation of the question, that the case should be argued a second time; and we also thought, from the nature of the question, that it was proper to request the attendance of her Majesty's judges upon the occasion, because we thought that the opinion of your Lordships' House being in concurrence with the opinion of the learned judges, would possess that weight with your Lordships, and that weight with the country, which, upon all occasions, the opinions of her Majesty's judges are entitled to receive.

My Lords, it appeared to me, in the course of the argument, that the question turned, as it must necessarily turn, upon the meaning of the statute. In the very first section of the statute, the operation of it is limited to Great Britain; it does not extend to Ireland, it does not extend to the colonies, and, therefore, notwithstanding the general terms contained in the schedule, those terms must be read in connection with the first section of the act; and it is clear, therefore, that they must receive that limited construction and interpretation which is only consistent with the first section of the act. Accordingly, my lords, it has been determined, in the case that was cited at the bar, *In re Bruce*,^(a) that it does not apply, notwithstanding the extensive terms, to the case of a foreigner residing abroad, and a will made abroad; although the property may be in England; although the executors may be in England; although the legatees may be in England, and although the property may be administered in [*160] England. That was decided, *expressly, in the case *In re Bruce*, which decision has never been quarrelled with that I am aware of, and in which the crown seems to have acquiesced.

Also, my lords, it has been decided in the case of British subjects domiciled in India and having large possessions of personal property in India, that the legacy duty imposed by the act of Parliament, does not apply to cases of that description; although the property may have been transmitted to this country by ex-

(a) 2 Crom. & Jerv. 436.

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ecutors in India to executors in this country, for the purpose of being paid to legatees in England. Those are the limitations which have been put upon the act by judicial decisions.

But then this distinction has been attempted to be drawn, and it is upon this distinction that the whole question turns. It is said that, in this case, a part of the property was in England at the time of the death of the testator, a circumstance that did not exist in the case of *The Attorney-General v. Jackson*, and which did not exist in the case of *Arnold v. Arnold*; and it is supposed that some distinction is to be drawn, with respect to the construction of the act of Parliament, arising out of that circumstance. I apprehend that that is an entire mistake; that personal property in England follows the law of the domicile; that it is precisely the same as if the personal property had been in India at the time of the testator's death. That is a rule of law that has always been considered as applicable to this subject; and, accordingly, the case which has been referred to by the learned chief justice, the case of *Ewin*, was a case of that description. An Englishman made his will in England; he had foreign stock in Russia, in America, in France, and in Austria; the question was *whether the legacy duty attached to that foreign stock, [*161] which was given as part of the residue, the estate being administered in England; and it was contended, I believe, in the course of the argument, by my noble and learned friend who argued the case, in the first place, that it was real property: but finding that that distinction could not be maintained, the next question was whether it came within the operation of the act: and, although the property was all abroad, it was decided to be within the operation of the act as personal property; on this ground only, that, as it was personal property, it must, in point of law, be considered as following the domicile of the testator, which domicile was England.

Now, my Lords, if you apply that principle which has never been quarrelled with, which is a known principle of our law, to the present case, it decides the whole point in controversy. The property, or part of the property, was in this country at the time

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of the death of the testator ; it was personal property ; and, following the principle laid down in the case of *Erwin*, it must be considered as property within the domicile of the testator in Demerara ; and it is admitted that, if it was property within the domicile of the testator in Demerara, it cannot be subject to legacy duty. Now, my Lords, the only distinction between this case and *The Attorney-General v. Jackson*, and *Arnold v. Arnold*, is that to which I have referred ; and that distinction is decided, by the case *In re Erwin*, not to make any difference.

Now, my Lords, that being the case and the principle upon which I think this question should be decided, I was desirous of knowing what were the grounds of the judgment of the court below. I find that the judgment was delivered by two, [*162] or rather that the case was heard *by two very learned judges, Lord Gillies and Lord Fullerton. The judgment was delivered by the late Lord Gillies. I was anxious, therefore, from the respect which I entertain for those very learned persons, to know what were the grounds upon which their judgment was rested.

The first case to which they referred, for it was principally decided upon authority, was a case decided before Sir Samuel Shepherd, Chief Baron of Scotland. That case was very shortly stated in the judgment ; and I am very happy that the Solicitor-General gave us the particulars of that case ; for it appears that the legacy was charged upon real estate, and therefore it would not come within the principle which I have stated, and there might therefore have been a sufficient ground for the decision in that case. It is sufficient to say, that it does not apply to the case which is now before your Lordship's House.

Then the next case which was referred to, was the case of *The Attorney-General v. Dunn*;(a) but, my Lords, that could hardly be cited as an authority. It is true that the point was argued ; but it was not necessary for the decision of the case ; and no decision, in fact, was given upon the point. The chief

(a) 6 Mees. & Wells. 511.

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baron expressly reserved his opinion, and said that he should not express what his opinion was. Also the learned judge near me, Mr. Baron Parke, expressed the same thing. It is true that one of the learned judges said that, according to the impression upon his mind at that moment, he rather thought that the duty would be chargeable. He expressed himself in those terms according to his immediate impression; *but no [*163] decision was given upon the point; it was a mere *obiter dictum*; and surely such a *dictum* as that ought not to be cited as the foundation of a judgment of this description. Looking at the authorities, therefore, they appear to me not properly to support the judgment of the court below.

The third authority was that of my Lord Cottenham. Now my Lord Cottenham, in the case of *Arnold v. Arnold*, expressly states, in terms, that he considered the two cases, *The Attorney-General v. Cockerell*,^(a) and *The Attorney-General v. Beatson*,^(b) to have been overruled. He states that in precise terms. A particular passage was selected, from the judgment of my Lord Cottenham, to support the opinion of the learned judges in the court below; but I am quite sure, when that passage is read in connection with the whole judgment of that very learned person, that every person reading it with attention must be satisfied that the inference drawn from that particular passage, is not consistent with the whole tenor of the judgment.

It appears to me, therefore, that none of the authorities which were cited in the court below sustained the judgment; and I am of opinion, therefore, independently of the great respect which I entertain for the judgment of the learned judges who have assisted us upon this occasion, that, upon the true construction of the act of Parliament, and applying the known principles of the law to that construction, the legacy duty is not, in a case of this description, chargeable. I shall move, therefore, with your Lordships' consent, that the judgment in this case be reversed.

(a) 1 Price, 165.

(b) 7 Price, 560.

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[*164] *Lord Brougham and Lord Campbell expressed, at some length, their concurrence in the motion of the noble and learned lord. Lord Campbell added that, hereafter, the question as to the liability of the personal property of a deceased person to legacy duty must be determined by his domicil; but that, if it was necessary either to prove his will or to take out letters of administration to his effects in this country, duty would be payable on the probate or the letters of administration, as the case might be, wherever he might have been domiciled at his death.

Judgment for the plaintiff in error.

REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
HIGH COURT OF CHANCERY,
BEFORE THE
VICE-CHANCELLOR.

*HARE v. CARTRIDGE.

[*165]

Will.—Construction.—Uncertainty.

1842: 13th July.

Testator bequeathed his residue to his first cousins, the children of his father's brother, of the name of C. The testator's father had two brothers of the name of C.; both of whom had left children. Held that the bequest was not void for uncertainty; but that the children of both the brothers were entitled to share in the residue.

JOSEPH CARTRIDGE, the testator in the cause, bequeathed the residue of his personal estate to the plaintiffs, upon trust to pay and apply and to equally divide the same unto and between and amongst his first cousins, the children of his father's brother of the name of Cartridge, and his nephews and nieces, children of his half brothers of the name of Webb, such half brothers being the children of his mother by her first husband, or to such of them, his said cousins, nephews or nieces as should be living at the time of his decease: and, in case any or either of his said cousins, nephews or nieces should have departed this life, in his lifetime, leaving a child or children, such child or children should take their parent's share.

The testator's father had two brothers of the name of Cartridge,

1842.—*Hare v. Cartridge*.

James and Richard. Both of them died in the testator's lifetime, leaving children, some of whom survived the testator.

[*166] *The bill was filed against the surviving children of the two brothers of the testator's father, the nephews and nieces of the testator of the name of Webb, and his next of kin, for the purpose of having his estate duly administered, and the rights and interests of the defendants to and in the residue, ascertained and declared by the court.

Mr. *G. Richards* and Mr. *Dixon* appeared for the plaintiffs.

Mr. *Girdlestone* for the surviving children of the two brothers, said, that the words: "The children of my father's brother," were surplusage; and that the residuary clause ought to be read as if it had stood thus: "To my first cousins of the name of Cartridge."

Mr. *Pole*, who was with Mr. *Girdlestone*, cited *Sleech v. Thorington*; (a) *Stebbing v. Walkey*; (b) *Scott v. Fenoulhett*; (c) *Garvey v. Hibbert*; (d) and *Harrison v. Harrison*; (e) in order to show that the children of both the brothers ought to be held to be objects of the trust.

Mr. *Wakefield*, Mr. *Teed*, Mr. *Stinton* and Mr. *Piggott*, for the defendants, the Webbs, said that it was uncertain whether the testator intended the children of the one brother or of the other to be objects of the trust; and, therefore, the Webbs were entitled to the whole of the trust fund; *Barber v. Barber*. (g)

[*167] *Mr. *Shee*, for the testator's next of kin, said that the Webbs were entitled to so much only of the fund as the

(a) 2 Vez. 560.

(b) 2 Bro. C. C. 85; *S. C.*, 1 Cox. 250.

(c) 1 Cox, 79.

(d) 19 Vez. 12b.

(e) 1 Russ. & Myl. 72.

(g) 3 Myl. & Cr. 688. See Judgment, p. 697, where a distinction is drawn between a gift to a class, and a gift to individuals by their names, though they, together, constitute a class.

1842.—Hare v. Cartridge.

other persons, named as objects of the trust, were not entitled to; and, therefore, the uncertainty with regard to those other persons, affected the whole of the trust, and rendered it altogether void. He cited *Chapman v. Brown*; (a) *Simon v. Barber*; (b) *Bennett v. Hayter*; (c) and *Skrymsher v. Northcote*. (d)

THE VICE-CHANCELLOR:—I am of opinion that the testator's first cousins on his father's side, are entitled to take.

He has given the residue of his personal estate to trustees, upon trust to pay, apply and equally divide the same unto, between and amongst his first cousins, the children of his father's brother of the name of Cartridge, and his nephews and nieces, children of his half brothers of the name of Webb; such half brothers being the children of his mother by her first husband; or to such of his said cousins, nephews or nieces, as should be living at the time of his decease; and, in case any or either of his said cousins, nephews or nieces, should have departed this life in his lifetime leaving a child or children, such child or children should take their parent's share. Now, it is obvious that he had two classes of persons in his view, namely, his cousins and his nephews and nieces, the children of certain persons whom he has named. But it has been said that the trust is void, because, having had two brothers of the name of Cartridge, he has used the word of "brother," in the singular number.

He has not, however, used any negative words, so as *to [*168] exclude the children of any brother of his father of the name of Cartridge from taking. And, therefore, it does not appear to me that there is anything inconsistent in holding that all the testator's first cousins, who were children of his father's brothers of the name of Cartridge, are entitled to take.

Declare that, according to the true construction of the will, all the testator's first cousins, children of his brothers of the name of Cartridge, and all his nephews and nieces, children of his half brothers of the name of Webb, who were living at the time of

(a) 6 Ves. 404.

(c) 2 Beav. 81.

(b) 5 Russ. 112.

(d) 1 Swanst. 566.

 1842.—Campbell v. Campbell.

his decease, and the children then living of such of his said cousins, nephews and nieces as were then dead, are entitled to share in the residue of his personal estate.

CAMPBELL v. CAMPBELL.

Executor.—Commission.—Indian Executor.

1842: 15th July.

If an executor in India collects part of the assets there, and then comes to England, and has the remainder remitted to him, by his agent, he is entitled to commission on that part only which he collected in India.

THE testator in this cause was resident in India and died there in 1832, having appointed the defendant, who also resided in India, his executor. A few months after his death, the defendant proved his will in Calcutta; and collected part of his assets. In 1836, the defendant came to this country, and proved the will in the Prerogative Court of the Archbishop of Canterbury. After the defendant's departure from India, two of his friends, who resided in India and acted as his agents there, collected the remainder of the assets, and remitted the amount to him, for which they charged and were allowed a commission of one quarter per cent.

The master, in taking the accounts of the testator's [*169] estate, allowed the defendant commission, at 5l. *per cent. upon the sum total of the assets. The plaintiffs excepted to the report, on the ground that the master ought to have allowed the commission on such part only of the assets as the defendant had, himself, collected in India.

Mr. Stuart and Mr. James, in support of the exception, cited *Cockerell v. Barber*, (a) and *Denton v. Davy*, (b)

(a) *Ante*, Vol. I, p. 23.

(b) 1 Moore's Privy Coun. Ca. 15.

1842.—Campbell v. Campbell.

Mr. G. Richards and Mr. Keene for the defendant, cited *Chet-
ham v. Lord Audley*(a) and *Freeman v. Fairlie*.(b)

THE VICE-CHANCELLOR :—I remember that, some years ago, I took some pains to ascertain what the law was with respect to the allowance of commission to an Indian executor : and I ascertained that it was allowed in respect only of the assets collected, by the executor, *whilst he was in India* : and that it was allowed because the Indian courts allow it : and, as the Indian courts allow it on the ground of residence in India, it is allowed, by the courts in this country, on the same ground.

The language of the order pronounced by Sir John Leach, V. C., in *Cockerell v. Barber*, which was affirmed by Lord Eldon,(c) seems to me to be decisive of the question. His Honor declared that the executor in that case, was entitled to be allowed, on passing his accounts before the master, commission, after the rate of 5l. per cent., upon all the *assets collected and received or to be collected and received by him in India*.

*With respect to the case of *Denton v. Davy*, I have [*170] to observe that, though the judgment in that case was delivered by me, it was an expression, not of my own individual opinion merely, but of the opinions of all the members of the judicial committee of the Privy Council who were present on the occasion.

What I propose to do, in the present case, is to allow the exception ; and to declare that the master ought to have allowed the commission in respect only of that portion of the assets which was collected by the defendant whilst he was in India.

In *Hovey v. Blakeman*(d) the question was whether the executors of the testator, who had been his agents in his lifetime, were entitled to commission on the money due on certain bills of exchange which they received after his death ; and it was held that

(a) 4 Vea. 72.

(b) 3 Mer. 24.

(c) 2 Russ. 585.

(d) 4 Vea. 596.

1842.—*Fentiman v. Fentiman*.

they were not; because the bills had been remitted to them by the testator in his lifetime; and therefore, the receipt of the money was to be referred to his act.

[*171]

*FENTIMAN v. FENTIMAN.

Infant.—Maintenance.

1842: 22d July.

Under a will, an infant was entitled to maintenance out of the income of property which was devised to him, provided he attained twenty-one; and 100*l*. a year was allowed, by the master, for that purpose: but the income of the property was scarcely sufficient to pay certain annuities and other prior charges thereon. Under those circumstances it was ordered that the trustees and executors should be at liberty, out of any funds in their hands, to pay the 100*l*. a year; and, if the same should be insufficient, that what the guardian should pay for the infant's maintenance, should form a charge upon his interest in the property.

UNDER the will of the testator in this cause, the plaintiff, who was an infant of the age of ten years, was entitled to have the surplus income of the testator's property, after paying certain annuities and other charges thereon, applied for his maintenance and education during his minority; and, provided he attained twenty-one, he would become entitled to the *corpus* of the property.

Since the testator's death the plaintiff had been maintained and educated by his mother, Mary Ann Hoy, who, after the testator's death, married the defendant Robert Twentyman; and, in pursuance of the decree made at the hearing of the cause, the master found 148*l*. to be due to her for the plaintiff's past maintenance and education, and that 100*l*. a year would be proper to be allowed for those purposes in future. It appeared, however, on the cause coming on to be heard for further directions, that the income of the testator's property was scarcely sufficient to pay the annuities and the interest of the other charges thereon. Under those circumstances, the order, on further directions, after, amongst other things, appointing Mrs. Twentyman and the de-

1842.—Talbot v. Ford.

fendant J. P. Fearon to be the guardian of the plaintiff during his minority, proceeded as follows: "And it is ordered that the defendants J. P. Fearon and J. S. Yeats, (the executors and trustees of the will,) out of the clear rents and profits of the said testator's *freehold, copyhold and leasehold estates, [*172] after payment of the interest on the mortgage in the report mentioned and the prior charges and out-goings on the said estates, pay the annuities of 200*l.* each bequeathed, by the said testator's said will, to the defendants Catharine Fentiman and Mary Ann Twentyman, until the further order of this court: and it is ordered that they *be at liberty*, out of any funds in their hands, to pay to the said defendant Mary Ann Twentyman, on her separate receipt, the sum of 148*l.*, for the past maintenance of the plaintiff up to the 5th day of June, 1840, and the yearly sum of 100*l.* for his future maintenance, from the last mentioned day, certified, by the master's report, to be proper to be allowed for that purpose; and, if the same shall be insufficient, declare that what the defendants Mary Ann Twentyman and J. P. Fearon, or either of them, shall have paid or shall pay in respect of such past and future maintenance, *forms a charge upon the estate and interest of the plaintiff* in the real and personal estate of the said testator, given and devised to him by the said will."

The counsel in the cause were Mr. *G. Richards*, Mr. *Teed*, Mr. *Wood*, Mr. *J. Baily*, Mr. *Torriano*, Mr. *De Gex* and Mr. *Bilton*.

*TALBOT v. FORD.

[*173]

Covenant.—Specific Performance.—Agreement.—Hard Bargain.—Injunction.

1842: 26th July.

A lease of mines contained a covenant that, if the lessor should, at any time before the expiration or determination of the lease, give notice, in writing, to the lessee, of his desire to take all or any part of the machinery, stock in trade, implements, &c., in or about the mines, then the lessee would, at the expiration of the lease, deliver the articles specified in the notice to the lessor, on his paying the value of

1842.—Talbot v. Ford.

them, such value to be ascertained in the manner therein mentioned. Held that the covenant was so injurious and oppressive to the lessee, that the court ought not to enforce it, or to grant an injunction to prevent a breach of it.

THE plaintiff was the lessor, and the defendant Digby was the lessee of certain mines in Wales, for thirty-one years from the 25th of March, 1837. The lease contained a covenant, on the part of the lessee, that, in case the plaintiff, his heirs or assigns, should, at any time before the expiration or sooner determination of the lease, give to Digby, his executors, &c., notice, in writing, of his desire to take, at a valuation, all or any part of the movable machinery, going gear, stock in trade, implements, utensils, articles and things in or about the mines, then Digby, his executors, &c., would, on the expiration or determination of the lease, deliver to the plaintiff, his heirs or assigns, all or such part of the said movable machinery, &c., as should be specified in the notice, and, thereupon, the plaintiff, his heirs or assigns, should pay to Digby, his executors, &c., the fair value of the articles so delivered, such value to be settled by arbitration.

In 1841, Digby assigned the machinery, implements, utensils, and other articles in and about the mines, to the defendant Ford, as a security for money lent. In 1842, Ford advertised the articles for sale, in pursuance of a power for that purpose contained in his security. Shortly afterwards, the plaintiff, without having taken any step to determine the lease, served [*174] *Digby with a notice, in writing, expressing his desire to take, at a valuation to be made according to the covenant, such part of the movable machinery, going gear, &c., in and about the mines, as was mentioned in the notice: and then filed the bill in this cause, praying that it might be declared that he was entitled to have the covenant specifically performed, and that Ford might be restrained from selling or removing the articles mentioned in the notice.

Mr. Bethell and Mr. W. M. James now moved for the injunction.

Mr. Wakefield, Mr. G. Richards and Mr. Chandless opposed the motion.

1842.—Talbot v. Ford.

They said, first, that, under the covenant which the bill sought to enforce, the lessor might give notice, shortly after the commencement of the term, of his desire to purchase the stock in trade or any of the other articles mentioned in the covenant, and thereby prevent the lessee from disposing of his stock in trade or of any of the other articles specified in the notice, until the end of the term; and that such a covenant was so hard and unreasonable, that the court would not give effect to it: *Kimberley v. Jennings*.^(a) Secondly, that the court would not act upon an agreement to purchase property at a price to be fixed by arbitrators: *Gourlay v. The Duke of Somerset*.^(b)

THE VICE-CHANCELLOR:—It is not unusual to insert, in leases of mines, a covenant which enables the lessor to purchase machinery *and other articles belonging to the [175] lessee and used by him in working the mines, on the lessor giving notice of his desire to purchase them, shortly before the expiration of the lease; so that the lessor's option of purchasing the articles, is, of necessity, confined to such as may be in or about the mines at the expiration of the lease. But the covenant on which the present motion is founded, enables the lessor, at any time after the commencement of the term, to put, as it were, a *ne amoveas* upon the lessee's stock in trade and other articles used by him in working the mines; that is, it enables the lessor to defeat, to a considerable extent at least, the object and intention of the lessee in taking the lease. For I do not see how, consistently with the power which this covenant purports to give to the lessor, the lessee can work the mines to any advantage. It seems to me that it was by mere want of caution that this covenant was worded as it is; for I cannot suppose that the parties could have intended that it should be expressed in the unqualified terms in which we find it. But, be that as it may, my opinion is that it is so injurious and oppressive to the lessee, that this court ought not to interfere for the purpose of giving effect to it; and, therefore, I shall not grant the injunction.

(a) *Ande*, Vol. VI, p. 240.

(b) 19 Ves. 459.

 1842.—In re London Bridge Acts.

[*176] *IN RE THE LONDON BRIDGE ACTS 10TH GEO. IV, &
2D WILL. IV : AND IN RE WITTS' ESTATE ACT, 5th
VICT. C. 4.—EX PARTE THE CLOTHWORKERS' COMPANY.

Ovenants for Title.—Tenant for Life.—Vendor and Purchaser.

1842: 3d November.

Estates were devised to A. for life, remainder to B. for life, remainder to his sons successively in tail male. A. and B., during the infancy of B.'s eldest son, obtained an act of Parliament, vesting the estates in trustees in trust to sell. Held that A. and B. must covenant, with the purchaser, for the title. If settled estates are sold under a power to sell them with the consent of the tenant for life, he must covenant for the title.

Agreement.—Construction.

A. being tenant for life of an estate, with remainder to his sons, successively, in tail male, entered into an agreement with B., by which it was stipulated that A. should procure an act of Parliament to enable him to sell the estate to B.; and that B. should bear all the expenses incident to and consequent upon his proposal to purchase the estate, together with the expense of obtaining the act, of preparing the abstract and showing a title to the estate, and of and about making and completing the sale and conveyance to him, together with the expense of the agreement, and all other expenses whatsoever of A., in consequence of the sale, or arising out of, or in anywise relating thereto, or to the proposal of B. A. accordingly obtained an act for the sale of the estate to B., which directed the purchase money to be invested in lands to be settled to the same uses as the estate stood limited to. Held that B. was not bound to pay the expenses of the investment.

IN June, 1841, Francis Edward Witts, being tenant for life, under the will of Broome Witts, of three houses in Fenchurch street, London, with remainder to his son, Edward Francis Witts, for life, with remainders to the first and other sons of Edward Francis Witts in tail male;(a) with divers remainders over; and the Clothworkers' Company being entitled to a fund in court, which was liable to be invested in the purchase of freehold estates, it was agreed between them that the Messrs. Witts should obtain an act of Parliament to enable them to sell the houses, and that the company should purchase them for such a sum, to be paid out of the fund in court, as, if laid out in consols at the time of completing the purchase, would buy 10,000*l.* of that

(a) The first tenant in tail male was a minor, aged only seventeen months.

stock; and that, upon payment of the purchase money to the person or persons who, under the act, should be authorized to receive and give a discharge for it, the houses should be conveyed, by all proper parties, to the company and their successors, freed and discharged from all estates, titles, charges and incumbrances whatsoever.

By an order of the court made in November, 1841, it was referred to the master, to settle and approve, as *soon [*177] as the act of Parliament should be obtained, of a proper conveyance of the houses to the company; and it was ordered that, upon the master certifying his approval of such conveyance, the purchase money should be raised by sale of a competent part of the fund in court, and should be paid into the bank and be carried over to the credit of such account as the master should certify to be directed or authorized by the act of Parliament.

The act (being the third mentioned in the title to this case) was accordingly obtained; and, thereby, the houses were vested in two trustees in fee, discharged of the uses, &c., contained in the will of Broome Witts, in trust to sell the same to the company for the sum agreed upon; and, upon payment of that sum into the bank according to the directions of the act, to convey and assure the houses to the company, their successors and assigns.

In pursuance of the order of November, 1841, the master approved of a draft of a conveyance of the houses, to be made between the trustees of the act of the one part, the Messrs. Witts of the second part, and the company of the third part: but it contained no covenants for title. Whereupon the company presented a petition insisting that the draft ought to have contained covenants on the part of the Messrs. Witts, severally, that, notwithstanding any act done by them or the trustees of the act, or by Broome Witts, the testator, or any person claiming under him, the trustees and the Messrs. Witts, or some or one of them, had power to convey the houses; and for the quiet enjoyment

thereof free from incumbrances; and for the further assurance *thereof by the Messrs. Witts and their heirs, and by the trustees and the survivor of them and his heirs, and all persons claiming under the testator: or, at any rate, that the draft ought to have contained a covenant, on the part of the Messrs. Witts, that they had not incumbered the houses. The petition prayed that it might be referred back to the master to review his report; and that it might be declared that, in the conveyance to be made to the petitioners, the Messrs. Witts ought to enter into such or the like covenants as before mentioned; or that they ought, at any rate, to covenant that they had not incumbered the houses.

Mr. *Lloyd* appeared for the Clothworkers' Company.

Mr. *Craig* for the Messrs. Witts, contended that they were not bound to enter into covenants for the title to the houses, first, because they were not the absolute owners of them; and, secondly, because the rights of all persons claiming under either the Messrs. Witts or the testator, were barred by the act of Parliament; for, although it contained a saving clause, the rights of those persons were excluded, expressly, from the protection of that clause.(a)

The VICE-CHANCELLOR said that, supposing the necessity for the covenants not to be done away with by the exception [*179] *in the saving clause, the question was what was the rule as to the obligation of tenants for life, in cases like the present, to enter into covenants for title: that he apprehended that, where the only persons who were immediately interested in the estates were tenants for life, it was the usual course to make them covenant for the title: that the tenants for life in this case stood in the same situation as if there had been a power

(a) The clause alluded to above, saved the rights of all persons, except F. E. Witts, E. F. Witts, the sons of the latter, the heirs male of such sons, the remainder-men (all of whom it named,) the right heirs of the testator, the assigns of the said several persons respectively, and all persons claiming through or under such persons respectively, and all other persons claiming or to claim under the testator's will.

to sell the estates with their consent; in which case, it would be a matter of course for them to enter into the covenants.

Notwithstanding the comprehensive terms in which the exception in the saving clause was expressed, the Vice-Chancellor considered that that exception did not include the assigns of the testator himself; the words: "and all and every the assigns of the said several persons respectively," meaning only, as he thought, the assigns of the devisees whose names had been previously mentioned.

His Honor added that it must be referred back to the master, to review his report; but that it would not be necessary for the covenants to extend to the acts of those persons whose rights were excluded, by the exception in the saving clause, from the protection of that clause.

A petition was presented, in the same matters, by the Messrs. Witts, insisting that they ought not to be made parties to the intended conveyance. But

The VICE-CHANCELLOR said that they were necessary parties, because, as he had before decided, they were bound to *covenant for the title to the premises agreed to be sold; [*180] and also because the agreement between them and the company, stipulated that all deeds and documents in their possession which related as well to other property as to the premises agreed to be sold, should be retained by them, but that the company should be entitled to a covenant for the production of such deeds and documents; and that that stipulation alone, made the Messrs. Witts necessary parties.(a)

The Messrs. Witts further objected, by their petition, that, if they were necessary parties to the intended conveyance, it ought

(a) It is submitted that the covenant might have formed the subject of a distinct deed.

not to recite, as it did, that the company had, in pursuance of the act of Parliament, paid all the expenses, in and by the articles of agreement, agreed to be paid by them; inasmuch as the articles contained a clause in the following words: "That all the expenses incident to and consequent upon the proposal, by the company, to purchase, and the negotiation consequent thereon, together with the expense of obtaining the act, of preparing the abstract of title and showing a title to the premises [*181] *agreed to be sold, and of and about making and completing the sale and conveyance to the company, together with the expense of these presents, *and all other expenses whatsoever of the said Francis Edward Witts and Edward Francis Witts in consequence of the said sale, or arising out of or in anywise relating thereto or to the said proposal of the said company*, should be paid by the said company, except in case the said act should not be obtained in consequence of the want of consent of any person or persons whose consent should be required for passing the same, or from any other cause resting with the vendors." But, notwithstanding that clause, the company had not paid the expense of re-investing the purchase money for the premises, (in pursuance of a direction for that purpose contained in the act,) in the purchase of lands to be settled to the same uses as the premises agreed to be sold stood limited to.

Mr. *Craig* for the Messrs. Witts.

Mr. *Lloyd*, for the company, said that the re-investment, though directed by the act, was not provided for, or even alluded to, in the articles of agreement; and that the only expenses which the articles subjected the company to, were the expenses incident to the sale of the premises; and, consequently, they were not bound to defray the expenses of the re-investment.

The VICE-CHANCELLOR said that, by the act of Parliament, the premises agreed to be sold were vested in the trustees, in trust to convey the same to the company, upon payment, by the company, of the purchase money, of the expenses of obtaining the act, and all other expenses which they had agreed to pay;

1842.—Gauderton v. Ganderton.

and, therefore, the act made the payment of those expenses *by the company, a condition precedent to the conveyance; and, consequently, the payment of them must, of necessity, appear upon the face of the conveyance: and he agreed with Mr. *Lloyd*, that the company were not bound, by the articles of agreement, to pay the expenses of re-investing the purchase money as directed by the act. [*182]

Petition dismissed.

BETWEEN RICHARD AND ANNA MARIA GANDERTON, INFANTS,
BY J. MARTIN, THEIR NEXT FRIEND, *Plaintiffs*; AND THOMAS
AND FREDERICK GANDERTON, *Defendants*:

AND BETWEEN THE SAID RICHARD AND ANNA MARIA GANDERTON, BY J. C. HOMER, THEIR NEXT FRIEND, *Plaintiffs*; AND THE SAID THOMAS AND FREDERICK GANDERTON, *Defendants*.

Infant.—Report.

1842: 4th and 5th November.

Two suits having been instituted on behalf of the same infant plaintiffs, it was referred to the master, to inquire and state whether the bills were for the same matters, and, if so, which of the suits it would be most for the benefit of the infants to prosecute; but the order did not give the master liberty to state special circumstances. The master reported that the two bills were, substantially, for the same matters, and that it would be most for the benefit of the infants to prosecute the first suit; but that, as the same person was solicitor both for the next friend and for the defendants in that suit, he was of opinion that some other solicitor should be appointed for the plaintiffs, and that part of the funds in the cause, which were then in a country bank, should be brought into court. Held that the master had given a qualified answer to the question referred to him, and added suggestions which he was not at liberty to make; and, therefore, it was referred back to him to review his report.

On the 12th of January, 1842, an order was made, in the above suits, by which it was referred to the *master [*183] to inquire and state whether the bills filed in those suits were for the same matters; and, if so, which of the suits would be most for the benefit of the infant plaintiffs to prosecute, having

1842.—Ganderton v. Ganderton.

regard to the amendments mentioned in the affidavit of Edward Flower, and filed on the 11th of January then instant; and it was ordered that all the proceedings in both the suits should be stayed until the report of the master should have been made and until the further order of the court. On the 23d of June, 1842, the master reported that the bills were, substantially, for the same matters, and that it would be most for the benefit of the infant plaintiffs to prosecute the first suit, having regard to the amendments mentioned in Flower's affidavit; but that, inasmuch as the solicitor for the next friend in that suit, was also the solicitor for the defendants, the master was of opinion that, for the purpose of having that suit prosecuted impartially and effectually, some solicitor not connected with the defendants should be appointed for the plaintiffs, and that such money as was then in the hands of the Gloucestershire Banking Company, and in the bank of Messrs. Berwick & Co., part of the funds in question in the causes, should be brought into court.

In July, 1842, two petitions were presented in the names of the plaintiffs, one praying that the report might be confirmed, and all further proceedings in the second suit stayed, and that Homer might be ordered to pay all the costs incurred in it; and that the first suit might be prosecuted, and that, in the prosecution thereof, Martin might have regard to the opinion expressed by the master, with reference to the appointment of a solicitor unconnected with the defendants, and the bringing into court of the money [*184] mentioned in *the report. The other petition stated several objections to the report, and prayed that the master might be directed to review it, or that the plaintiffs might be at liberty to except it. Both the petitions now came on to be heard. One was supported by Mr. *Stuart* and Mr. *Gifford*, and the other by Mr. *Bethell* and Mr. *Freeling*.

THE VICE-CHANCELLOR:—It is quite clear that the master's report cannot be supported.

The order of reference, except so far as it related to the amendments mentioned in Flowers' affidavit, was the common order.

And the master was to inquire and state which of the two suits was most beneficial to the infants, having regard to those amendments. Then what has he done? He has found that the bills are *substantially* for the same matters: but that was not the question referred to him. What am I to infer to be the meaning of the word "substantially?" Does the master mean that the two suits are or are not for the same matters? The answer which he has given to the question referred to him, is not a positive but a qualified answer. And, if the two suits are not for the same matters, then the master ought not to have proceeded further; for it was only in the event of their being for the same matters, that he was to proceed to state which was most for the benefit of the infant plaintiffs to prosecute.

He has, however, not only gone on to state which of the two suits it was most for the benefit of the infants to prosecute, but has recommended a new solicitor to be appointed for the plaintiffs in that suit, with a view *to its being impartially and effectually prosecuted; and also that certain moneys should be brought into court in that suit: so that, in effect, he has neither given a positive answer to the first question, nor has he given a simple answer to the second question referred to him; for he has said that the first suit will be most for the benefit of the infants to prosecute, provided certain things are done in that suit.

Upon these grounds, and, especially, as the order of reference did not give the master liberty to state special circumstances, my opinion is that he has miscarried; and all that I can now do is to refer it back to him to review his report.

1842.—Swift v. Grazebrook.

SWIFT v. GRAZEBROOK.

Infant.—Solicitor.—Plaintiff.—Practice.

1842: 10th November.

The solicitor employed by the next friend, in an infant's suit, having given a notice of motion on behalf of the plaintiffs, one of the plaintiffs who had come of age, but had not disavowed the suit or obtained an order to change his solicitor, employed another solicitor to oppose the motion on his behalf. Held that the counsel instructed by that solicitor, were not entitled to be heard.

At the commencement of this suit, all the plaintiffs were infants, and, of course, they sued by their next friend. Pending the suit, one of them, Frederick Swift, attained twenty-one. After which, the next friend instructed Mr. Tarleton, the solicitor whom he had employed in the suit, to move that he might be discharged from being the next friend, and that another person might be appointed in his place. Frederick Swift, although he [*186] had neither disavowed the suit, nor applied *for leave to change his solicitor,(a) directed another solicitor to instruct counsel to oppose the motion on behalf of himself and his co-plaintiffs.

The motion was now made by Mr. *Bethell* and Mr. *Glasse* on behalf of the plaintiffs.

Mr. *Stuart* and Mr. *Spurrier* were instructed to oppose the motion by the solicitor employed by Frederick Swift; but Mr. *Bethell* and Mr. *Glasse* contended that they ought not to be heard, because Frederick Swift had not been served with notice of the motion, nor had he repudiated the suit or obtained an order to change his solicitor.

Mr. *Romilly* and Mr. *Shapter* appeared for the defendants, but did not oppose the motion.

(a) The 18th general order of October, 1842, directs that a party suing or defending by a solicitor, shall not be at liberty to change his solicitor without an order of the court for that purpose; and that, until such order is obtained and served, and notice thereof given to the clerk of records and writs, the former solicitor shall be considered as the solicitor of the party.

 1842.—Sloggett v. Viant.

THE VICE-CHANCELLOR :—A party cannot be represented by two solicitors. At present Mr. Tarleton is solicitor for all the plaintiffs, including Frederick Swift. Mr. Bethell and Mr. Glasse have been instructed by Mr. Tarleton; and, consequently, they are counsel for all the plaintiffs; and I cannot allow one of them to appear by a different solicitor, until he has obtained an order to change his solicitor; for, until he has done so, he cannot have a *different solicitor. And, as no one opposes [*187] the motion on behalf of the defendants, I shall make the order in the terms in which it is asked.

SLOGGETT v. VIANI AND OTHERS.

Costs.—Security for Costs.—Cross Cause.—Plaintiff.

1842: 10th November.

A. filed an original bill against B., and B. filed a cross bill against A. and others. They all moved that B. might give security for the costs of the cross suit. Motion refused. But leave was given to the co-defendants with A., who were not parties to the original suit, to move that B. might give security for the costs of the cross suit.

THE defendant Viant filed a bill of foreclosure against Sloggett, and Sloggett filed a cross bill against Viant and others, to set aside the mortgage.

Mr. Bethell and Mr. Prior moved, on behalf of *all the defendants* in the cross suit, that Sloggett might give security for the costs of that suit, on the ground that he had absconded.

Mr. Stuart, for Sloggett, said that a plaintiff in a cross suit, could not be compelled to give security for costs. *Thornton v. Wilson.*(a)

Mr. Bethell, in reply, said that the rule as to giving security for costs, applied to a cross suit as well as to an original one; and

(a) Hogan's Rep. (Irish) p. 20.

1842.—Cockburn v. Tolson.

that the defendants who joined in the motion with Viant, were not parties to the original suit; and, therefore, as far as they were concerned, the suit in which the motion was made was an original one.

The VICE-CHANCELLOR, after perusing the case cited by Mr. Stuart, and referring to the bill in *Sloggett v. Viant*, in order to satisfy himself that it was a cross bill, said :

[*188] *I rather think that I am not at liberty to grant the application. As all the defendants join in making the motion, whatever is an answer to it as to one of them, is an answer as to the rest of them.

Motion refused with costs.

His Honor, afterwards, gave the co-defendants with Viant, who were not parties to the original suit, leave to move that *Sloggett* might give security for the costs of his suit.

COCKBURN v. TOLSON.*New Orders of August, 1841.—Practice.*

1842: 10th November.

The court may permit a cause to be set down for argument on an objection for want of parties, after the fourteen days allowed for that purpose by the 39th order of August, 1841, have expired.

Two or three days after the fourteen days allowed, by the 39th general order of August, 1841, for setting down a cause for argument on an objection for want of parties, had expired,

Mr. *S. Atkinson*, for the plaintiff, moved for leave to set down the cause, *nunc pro tunc*. He read an affidavit, made by the plaintiff's solicitor, accounting for the delay.

 1842.—Bourn v. Bourn.

THE VICE-CHANCELLOR:—The 39th order does not say that a cause shall not be set down for the purpose mentioned, after the fourteen days have expired. It means that the cause shall be set down within the fourteen days, as a matter of course; but that, afterwards, the leave of the court must be obtained. And, as no one appears to oppose the motion, I shall grant it.

*BOURN v. BOURN.

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Biddings (opening of).—Practice.

1842: 10th November.

Biddings opened on an advance of 80*l.* on 430*l.*

MR. WILLCOCK moved to open the biddings for a part of the estates in this cause which had been sold for 430*l.*, offering an advance of 60*l.* upon that sum.

Mr. Hore opposed the motion on the ground that the sum offered would not cover the expense of the resale, which the party moving did not offer to pay. He cited *Upton v. Lord Ferrers*.(a)

The VICE-CHANCELLOR, however, granted the motion, on the usual terms.

(a) 4 Ves. 700.

*CATHARINE BLYTHE, THE WIFE OF THE DEFENDANT [*190]
EDWARD BLYTHE, BY HER NEXT FRIEND v. J. GRANVILLE AND OTHERS.

Settlement.—Construction.—Covenant.—Future Property of Wife.

1842: 11th November.

By a marriage settlement, 1,500*l.* and 2,700*l.* stock, of which the lady was possessed, were settled in trust for her separate use for life, remainder in trust for her in-

1842.—Blythe v. Granville.

tended husband for life, and after his death, as the wife should appoint by will: and the intended husband covenanted that, if the marriage should take effect, he would, as often as occasion should require, join with his wife, in doing all necessary acts for assigning to the trustees all the property to which his wife should become entitled during the coverture, upon the trusts declared of the 1,500*l.* and 2,700*l.* stock. At the date of the settlement, the wife had an absolute vested interest in 1,935*l.* stock, expectant on her father's death, but it was not mentioned in the settlement. During the marriage, the husband became bankrupt, and then the wife's father died. Held that the 1,935*l.* stock did not belong to the husband's assignee as part of his estate, but was bound by his covenant, as being property to which the wife would become entitled during the coverture.

Costs.—Assignee of Bankrupt.—Defendant.

A married lady filed a bill against her husband (who had become bankrupt) and his assignee, alleging that a sum of stock which had fallen into possession after the bankruptcy, was subject, under the circumstances stated in the bill, to the trusts of her settlement, and did not belong to the assignee. The assignee submitted the question to the court. The court decided that the fund was subject to the trusts of the settlement; and refused to give the assignee his costs; as he ought to have disclaimed.

In July, 1815, the defendants Samuel Downes and Charles Downes the younger and the plaintiff, who was then single, became possessed of certain sums of reduced annuities, as the next of kin of William Rhodes, their late uncle; and, being desirous of making some provision for their father, Charles Downes the elder, the plaintiff transferred 1,935*l.* reduced annuities, [*191] part of *the stock of which she so became possessed, and her brothers transferred two further sums, parts of the stock of which they so became possessed, making in the whole 4,670*l.* reduced annuities, into the names of the defendants John Granville and George Brydges Granville, in trust for Charles Downes the elder, for his life, and, after his decease, in trust, as to 1,935*l.* reduced annuities, part of the 4,670*l.*, to transfer the same to the plaintiff, her executors, &c.

By the settlement on the marriage of the plaintiff with E. Blythe, dated the 10th of October, 1817, and made between Blythe of the first part, the plaintiff of the second part, and her two brothers of the third part, after reciting the intended marriage and that the plaintiff was possessed of 1,500*l.* sterling and also of 2,700*l.* consols, and that upon the treaty for the marriage,

1842.—Blythe v. Graaiville.

it was agreed that the 1,500*l.* should be lent to Blythe, and that he should execute a bond to Samuel Downes and Charles Downes the younger, for securing the repayment of that sum with interest, and that, as well that sum and the 2,700*l.* consols, as *also all the future property which might devolve upon or come to the plaintiff, during her then intended coverture, by virtue of any gift, will, devise, descent, or by virtue of the statutes made for the distribution of intestates' estates, or by any other means whatsoever*, should be settled in manner thereafter mentioned; and that, for effectuating in part, the purposes aforesaid, the plaintiff should transfer the 2,700*l.* consols into the names of Samuel Downes and Charles Downes the younger, upon the trusts thereafter expressed; and that Blythe should enter into such covenant as therein and hereinafter mentioned, for effectually conveying, assigning and transferring to and vesting in Samuel Downes and Charles

*Downes the younger, their heirs, executors, administrators or assigns, upon the trusts thereafter mentioned, *all the future property to which the plaintiff should or might, by any of the ways or means aforesaid, become interested in during her then intended coverture*; and, after further reciting that the 1,500*l.* have been paid to Edward Blythe, and that he had given his bond to Samuel Downes and Charles Downes the younger, for securing the repayment of that sum with interest, and that the plaintiff had transferred the 2,700*l.* consols into the names of Samuel Downes and Charles Downes the younger; it was witnessed and declared that Samuel Downes and Charles Downes the younger should stand possessed of the 1,500*l.* and also of the 2,700*l.* consols, in trust for the plaintiff until the marriage, and, after the solemnization thereof, in trust, during the lifetime of the plaintiff, either to permit the 1,500*l.* to remain on the security of the bond, or, at the request of the plaintiff, to call in and invest the same upon the securities therein mentioned, and to stand possessed of the principal and the securities for the same, and also of the 2,700*l.* consols, in trust, during the joint lives of the plaintiff and of Edward Blythe, for the plaintiff, for her separate use, but without power of anticipation; and, if the plaintiff should survive Edward Blythe, then upon trust after his decease, to assign and transfer the trust funds to the plaintiff, her

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1842.—Blythe v. Granville.

executors, &c. ; but, if Edward Blythe should survive the plaintiff, then upon trust, after her decease, to assign and transfer the trust funds to such person or persons as the plaintiff should, by her will, appoint, and, in default of such appointment, upon trust to transfer the funds to Edward Blythe, his executors, &c. And Edward Blythe covenanted with Samuel Downes and Charles

Downes the younger, that, in case the marriage should
[*193] *take effect, he, his heirs, executors or administrators,

would, at the expense of the trust property, join with the plaintiff, from time to time, as often as occasion should require, in making, doing and executing all such acts, deeds, conveyances, assignments, matters and things as should be necessary or requisite for effectually conveying, assigning and transferring, to Samuel Downes and Charles Downes the younger, their heirs, executors or administrators, *all the property, of what nature or kind soever, to which the plaintiff should during the coverture, become entitled*, in order that the same might be fully and effectually vested in them, their heirs, executors, administrators and assigns, upon trust from time to time, when and as the same should be by them received or should so become vested in them, to make sale and dispose of and to convert the same, or so much thereof as should not consist of money or government securities, into money, and to lay out and invest the moneys thence arising, and all such parts thereof as should consist of money, in or upon some or one of the public stocks or government funds of Great Britain, and to stand possessed of the stocks, funds or securities in or upon which the same should be so placed out, and of all such parts of the said property as should consist of government securities and should be transferred to them as aforesaid, and of the dividends and interest to accrue due thereon, and of the interest and annual profits to arise from all such property in the meantime, upon the same trusts and for the same purposes, and subject to the same powers, &c., as were thereinbefore expressed concerning the 1,500*l.* and the 2,700*l.* consols and the dividends and interest thereof, or such and so many of the same trusts, &c., as should, from
[*194] time to time, be subsisting, undetermined and *capable of taking effect, or as near thereto as circumstances would permit.

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The marriage was solemnized on the day after the date of the settlement.

In March, 1820, Blythe became bankrupt, and the defendant Reynolds was chosen the assignee of his estate. At the time of his bankruptcy, the 1,500*l.* and all the interest that had become due on it, remained due on his bond, and the trustees never received any dividend in respect of it. Blythe obtained his certificate in May, 1820.

In November, 1839, Charles Downes the elder died. Upon his decease, the trustees of the settlement applied to the defendants John Granville and George Brydges Granville, to transfer to them the 1,935*l.* reduced annuities, upon the trusts declared by the settlement of the future property of the plaintiff; but the Messrs. Granville (as the bill alleged) refused to make the transfer, on the ground that the 1,935*l.* reduced annuities, was not subject to the trusts of the settlement, and was not bound by the covenant therein contained on the part of Blythe, to convey and assign, to the trustees thereof, all the property to which the plaintiff might become entitled during their coverture; and that, inasmuch as the marital right of Blythe, to the said sum of reduced annuities, was not affected by the settlement, the same became, immediately upon the death of Charles Downes the elder, vested in the defendant Reynolds, as his assignee, who accordingly claimed to be entitled thereto.

The bill prayed that it might be declared that the 1,935*l.* reduced annuities, was subject to the trusts *of [*195] the settlement, and that Blythe might be decreed to execute, or to join with the plaintiff in executing a proper assignment thereof, and of the dividends which had accrued thereon since the death of Charles Downes the elder, to the defendants Samuel Downes and Charles Downes the younger, upon the trusts of the settlement, and that the defendants, the Messrs. Granville, might be decreed to transfer the same to them.

The defendant Reynolds, by his answer, submitted to the judgment of the court, whether it was or not the fact that the interest

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of the plaintiff in the 1,935*l.* reduced annuities, immediately expectant upon the death of C. Downes the elder, did, according to the true construction of the terms of the settlement, become subject to the trusts thereof, or whether the Granvilles ought or ought not to transfer that sum into the names of Samuel Downes and Charles Downes the younger, upon a proper assignment thereof being executed to them by Blythe.

Mr. *Bethell* and Mr. *Boyle*, for the plaintiff, said that the word "property" was used throughout the settlement in its most general sense, and, therefore, it would include a *chose in action*; and the sum of stock in question, was property which would devolve to the plaintiff on the death of her father; and, consequently, there could be no doubt that it was now subject to the trusts declared by the settlement of the future property of the plaintiff. *Bulmer v. Jay*,^(a) *Graffley v. Humpage*.^(b)

THE VICE-CHANCELLOR:—The words "become entitled" *mean, "become entitled either in possession or in reversion."

Mr. *K. Parker* and Mr. *Dixon* for the defendant Reynolds:—If no portion of the wife's property had been mentioned or comprised in the settlement, or if the 1,935*l.* reduced annuities had not been capable of being settled at the time when the settlement was made, then it might have been contended, with some chance of success, that the husband's covenant in the settlement, (upon which alone the claim of the wife is founded,) did apply to that sum of stock. But the settlement not only mentions but deals with two portions of the wife's property; and, as to one of those portions, we mean the money secured by the husband's bond, there was a much greater chance (as the event proved) of its never becoming available to the purposes of the settlement, than there was as to the 1,935*l.* stock: for the wife had an absolute, vested interest in that sum, expectant only on the death of her

(a) *Ante*, Vol. IV, p. 48.

(b) 1 Beav. 46; see pages 52 *et seq.*

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father.(a) If then the wife's interest in that sum of stock was capable of being included in the settlement, together with the other portions of her property, what reason can be assigned for its not having been so included, except that the parties did not intended that it should be *included? They [*197] well knew that that property was in existence; but they do not even allude to it in any part of the settlement.

The husband's covenant applies to property to which the wife might, possibly, become entitled at some time or other during the coverture, and to which she then had no right or title whatever; but it has not the slightest application to property in which she then had an absolute, vested interest. And, as it is not even pretended that she has any claim to the property under any other clause in the settlement, the husband's marital right is left unaffected; and he having become bankrupt, his assignee is entitled to the property.

Mr. *Blunt* appeared for the other parties.

THE VICE-CHANCELLOR:—I have no doubt upon the question in this case.

It is plain what the parties to the settlement meant to do: they meant to deal with all the wife's property that was in a tangible shape at the time, by making an immediate settlement of it upon the trusts which we find in the deed; and they meant that all her other property should be settled in like manner, when it should be in a tangible shape. And, without referring to the recitals in the deed, my opinion is that the words of the husband's covenant do, *proprio vigore*, bind all the wife's other property, in the shape in which it then was.

(a) The wife had a present interest in the sums mentioned in the settlement; but her interest in the 1,935*l*. stock, was reversionary; and, consequently, it might not have become vested in possession during the coverture; and that, perhaps, may have been the reason why it was not mentioned in and settled by the settlement, but was left to be operated upon by the husband's covenant, when it should become vested in possession. The first trust declared by the settlement, was to take effect immediately after the marriage; and, therefore, it was not strictly applicable to a reversionary interest.

1842.—Blythe v. Granville.

Under the deed of 1815, the wife had a reversionary interest in the sum of 1,935*l.* reduced annuities: and, by the settlement, the husband covenanted that, in case the then intended [*198] marriage should take effect, he, his *heirs, executors or administrators, would join with the said Catharine Downes from time to time, as often as occasion should require, in making, doing and executing all such acts, deeds, conveyances, assignments, matters and things as should be necessary or requisite for effectually conveying, assigning and transferring unto the said Samuel Downes and Charles Downes, their heirs, executors and administrators, all the property, of what nature or kind soever, to which she, the said Catharine Downes, should, *during her said intended coverture, become entitled*, in order that the same might be fully and effectually vested in them, the said Samuel Downes and Charles Downes, their heirs, executors, administrators and assigns, upon the trusts and to and for the intents and purposes thereafter expressed and declared of and concerning the same. The covenant, therefore, plainly applies to that property which the wife would become entitled to as soon as the coverture took effect. The coverture was the futurity referred to; and, immediately on the marriage taking place, the wife became entitled to the property during the coverture.

The consequence is that the dividends of the 1,935*l.* reduced annuities which have become due since the decease of Charles Downes the elder, must be paid to the plaintiff, for her separate use, and the capital, after payment thereof of the costs of all parties except the defendant Reynolds, must be transferred to Samuel Downes and Charles Downes the younger, upon the trusts of the settlement.(a) I shall not give the defendant Reynolds his costs; for he ought to have disclaimed, and then the trustees of the fund would have transferred it to the trustees of the settlement.

(a) See *Hoare v. Hornby*, 2 Youn. & Coll. N. C. 121.

1842.—*Young v. Lord Waterpark.*

**YOUNG v. LORD WATERPARK.*

[*199]

Foreign Contract.—Sterling or Currency.—Interest.—Deed.—Construction.

1842 : 18th November.

A settlement was made, in Ireland, of estates, some of which were situate there and the rest in England, by which the estates were limited to trustees for a term of years, for raising, at a future time, 10,000*l.* for portions; and interest at 5½ per cent. was to be raised, out of the rents, for the children's maintenance in the meantime; but the settlement was silent as to the rate of interest on the portions after they had become payable. Held that the 10,000*l.* must be raised in Irish currency; but not with Irish interest, (6*l.* per cent.,) but 4*l.* per cent. according to the usual course of the court.

Appointment.—Power.

Under a marriage settlement, the husband and wife, having power to appoint 10,000*l.* amongst all their younger children, but in such shares as they should think fit, appointed the whole, in different sums and at different times, to four of the younger children, to the exclusion of the rest. Held that the three first appointments were good, and only the last, void.

Statute of Limitations, 3 & 4 Will. IV, c. 27, s. 42.

Under a marriage settlement, a term was vested in trustees for raising 10,000*l.* for the younger children of the marriage, and, subject thereto, the estates were limited to the first and other sons in tail male. Much more than twenty years after the 10,000*l.* ought to have been raised and paid, the younger children filed a bill, to have that sum raised. Held that the relation of trustee and *cestui que trust* existed between the parties; and, therefore, the Statute of Limitations, which enacts that money to be raised out of land shall not be recoverable, but within twenty years next after a right to receive the same shall have accrued to some person capable of giving a receipt for the same, did not apply.

In August, 1757, a settlement was made on the marriage of Henry Cavendish, Esq., afterwards Sir Henry Cavendish, Bart., with Sarah Bradshaw, afterwards Baroness Waterpark, by which 10,000*l.* was to be raised, under the trusts of a term of 500 years, out of estates, some of which were situate in England and the rest in Ireland, for the portions of the younger children of the marriage. The portions were to be paid, on the day after the death of Sir Henry Cavendish, to such of the younger sons as should attain twenty-one, and to such of the daughters as should attain that age or marry; and the trustees of the term were to

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raise, out of the rents of the estates, such yearly sum as should be equal to interest *at five per cent.* on the portions of the younger children, for their maintenance *until their portions should become payable.* All the parties to the settlement resided in Ireland, and the deed was executed there; but it did not mention whether the 10,000*l.* was to be raised in Irish or in English money.

There were seven younger children who attained twenty-one; but, notwithstanding Sir Henry Cavendish died in August, 1804, the whole of the 10,000*l.* had not been raised; and one object of the suit was to have the remainder raised, together with the arrears of interest thereon; and, as the settlement contained no direction **as to the rate of interest which the 10,000*l.* was to bear after it had become payable,* one question in the cause was whether the remainder of that sum was to be raised with Irish interest, (six per cent.,) or with English interest at 5*l.* per cent., or at 4*l.* per cent. according to the usual course of the court.

It was admitted that the *principal* was to be raised in Irish currency, according to *Saunders v. Drake*,^(a) where Lord Hardwicke, C., says that, if a bond be given at Dublin or a note at Jamaica, it must be paid in the current money.

The question as to the rate of interest, was argued by Mr. *Stuart* on one side, and by Mr. *Shadwell* on the other.

Mr. *Stuart* contended that, where the court had to direct a sum of money to be raised with interest, the rate of interest must be according to the usual course of the court.—[THE VICE-CHANCELLOR:—The question is, whether the deed does not afford evidence on the face of it, that the interest is to be at the rate of 5*l.* per cent.]

Mr. *Shadwell*:—The rate of interest which a sum of money is to bear, is regulated by the law of the country in which the con-

(a) 2 Atk. 466,

 1842.—*Young v. Lord Waterpark*.

tract or security is made. Besides, the settlement directs interest to be raised, at five per cent., for the maintenance of the children before the principal of their portions becomes due; and it is usual to allow something less for maintenance than is payable for interest, *after the portions become due. [*201] *Raymond v. Brodbelt*,(a) *Conner v. Lord Bellamont*,(b) *Phipps v. Lord Anglesea*.(c)

Mr. *Stuart*, in reply, said that, where a foreign contract was sought to be enforced in an English court, it must be enforced according to the course of that court; and that the *lex loci contractus* did not apply to such a case. He added that the bill did not pray for Irish interest, or for interest after any rate in particular.(1)

THE VICE-CHANCELLOR:—With respect to the principal money remaining to be raised under the trusts of the term, there can be no doubt that it is to be raised in Irish currency; for the settlement was made in Ireland; and, therefore, the principal must be paid in the currency of that country.

(a) 5 Ves. 199.

(b) 2 Atk. 382.

(c) 1 P. W. 696. See also *Ekins v. East India Company*, Ib. 395.

(1) As a general rule, interest is payable according to the laws of the country where the contract is made; but if, by the terms or nature of the contract, it appears that it is to be executed in another country, or that the parties had reference to the laws of another country, then the place in which it was made is, in this respect, immaterial, and it is to be governed by the laws of the country in which it is to be performed. *Fanning v. Consequa*, 17 John. R. 511; *S. C.*, 3 John. Ch. R. 610; *Horsford v. Nichols*, 1 Paige Ch. R. 220; *Thompson v. Ketchum*, 4 John. R. 285; *Haley v. Gorman*, 3 Green. N. J. R. 328; *Scofield & Taylor v. Day & Gelston*, 20 J. R. 102; *Andrews v. Pond*, 13 Pet. N. S. R. 65; *Chapman v. Robertson*, 6 Paige Ch. R. 627, 630 to 633. In *Fanning v. Consequa*, it was held, where a Chinese merchant residing at Canton, consigned goods to a merchant in New York, and which were delivered to his agent in Canton, to be sold by him, and the net proceeds to be remitted to the consignor at Canton, that the consignor was only entitled to recover interest according to the laws of New York, and not according to the law of Canton. In *Haley v. Gorman*, it was held that a note executed and dated in New York, and made payable at a bank in New Jersey, drew interest according to the law of the latter state. 13 Sim. 201.

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With respect to the interest, there is nothing, in the way of contract in this case, to show after what rate it is to be paid when the principal has become due: and, that being so, I can only give interest according to the usual course of the court, that is, at 4l. per cent.

[*202] *The questions to which the preceding part of this report relates, were argued, on an application being made to the court, to vary the minutes of the decree, in consequence of the Vice-Chancellor having directed, in the first instance, the remainder of the 10,000l. to be raised with interest at 5l. per cent. The principal question in the cause was argued and decided in July. It arose under the following circumstances:

The settlement directed that, if there should be two or more younger children of the marriage, the 10,000l. *should be paid to and distributed amongst them* in such shares as Sir H. Cavendish and Sarah, his wife, or the survivor of them, should by deed appoint, and, for want of appointment, equally. At different times, Sir H. Cavendish and his lady appointed *the whole* of the 10,000l. amongst *four* of the younger children, in sums of 2,000l. and 3,000l. The last appointment was made, of 3,000l., in February, 1803, in favor of George Cavendish, one of the children; but that sum had not been yet raised.

The bill, which was filed in June, 1838, by the personal representatives of Augustus Cavendish Bradshaw and Deborah Musgrave, two of the children in whose favor no appointment had been made, against Henry Manners Lord Waterpark, who was the grandson of Sir Henry Cavendish and Baroness Waterpark, and was in possession of the estates as heir in tail male to Richard Baron Waterpark, his late father, (who was the first tenant in tail male under the settlement,) and against the children in whose favor the appointments had been made, and also against

(a) The questions in the above case are discussed by Dr. Story, in his *Treatise on the Conflict of Laws*; and by Mr. Burge, in his *Commentaries on Colonial and Foreign Laws*, Vol. III.

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Richard Arkwright (to whom Richard Lord Waterpark had mortgaged the estates, *but with notice of the settlement,) and James Wigram, (to whom the term of 500 years had been assigned as a trustee for Arkwright, and who also had notice of the settlement,) praying that all the appointments, or, at any rate, the last of them, might be declared to be null and void, on the ground that the power did not authorize the 10,000*l.* to be appointed to any one or more of the younger children to the exclusion of the others of them: and that the 10,000*l.* might be equally divided amongst all the younger children; or, at any rate, that the 8,000*l.* which had not been raised, might be divided amongst such of them as the court should think fit; and that the plaintiff might be declared to be entitled to the shares of the two children whom he represented. [*203]

Mr. G. Richards and *Mr. Shadwell* for the plaintiff.

Mr. Stuart and *Mr. Law* for Lord Waterpark; *Mr. Koe* for George Cavendish; *Mr. Stinton* and *Mr. Parry* for the other defendants.

The VICE-CHANCELLOR said that the power of appointment was not an exclusive one; and, therefore, each of the younger children was entitled to participate in the 10,000*l.* He held, however, that the three first appointments were good, and that the last only was void. For, thereby, the whole of the fund remaining undisposed of, was appointed to George Cavendish to the exclusion of three of the younger children.

*Another question, which was argued by *Mr. Stuart* [*204] and *Mr. Law*, on behalf of Lord Waterpark, was whether, as all the younger children had attained twenty-one before their father's death, which took place on the 3d of August, 1804, the plaintiff's claim was not barred by the Statute of Limitations, 8 & 4 Will. IV, c. 27, s. 40, which enacts that no suit shall be brought to recover any sum of money charged upon or payable out of any land, but within twenty years next after a present

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right to receive the same shall have accrued to some person capable of giving a discharge for, or a release of the same.

The VICE-CHANCELLOR said that the relation of trustee and *cestui que trust* existed between the parties, and, therefore, the statute did not apply.(1)

Declare that the plaintiff, as the personal representative of Augustus Cavendish Bradshaw and Deborah Musgrave, both deceased, in the pleadings named, is entitled to two seventh parts of the sum of 3,000*l.* of the late Irish currency(a) part of the principal sum of 10,000*l.* like currency directed to be raised by the indentures of lease and release dated respectively the 10th and 11th days of August, 1757, together with interest thereon at the rate of 4*l.* per cent. per annum from the 4th day of [*205] August, 1804: and order that the same be *raised, by the defendant James Wigram, by sale or mortgage of the estates of the defendant Henry Manners Baron Waterpark comprised in the term of 500 years in the said indentures mentioned, or of a competent part thereof: and that the said two seventh parts and interest, when so raised, be paid to the plaintiff as such personal representative as aforesaid: and that the plaintiff do pay unto the defendant Sarah Countess of Mountnorris,(b) (one of the younger children,) her costs of this suit, to be taxed by the taxing master of this court in rotation; and refer it to the taxing master to tax the plaintiffs and the other defendants, except the defendant Baron Waterpark, their costs of this suit: and order that the same, when taxed, together with what the said plaintiffs shall have paid as the costs of the said

(a) The currencies of England and Ireland are now assimilated.

(b) It did not appear, from the papers with which the reporter was furnished, why Lady Mountnorris' costs were ordered to be paid differently from the costs of the other younger children.

(1) Where a testator devised freeholds and copyholds to his son for life, and after his decease to his first and other sons, "paying" 10*l.* a year to M. C. for life. It was held that the word "paying," created a charge and not a trust; and, therefore, the plaintiff claim was not saved by the 25th section of the Statute of Limitations. *Hodge v. Churchward*, 16 Sim. 72.

1842.—Cutts v. Thodey.

defendant Sarah Countess of Mountnorris, be paid by the said defendant Baron Waterpark, or else be raised and paid out of the said estates: and any of the parties are to be at liberty to apply, &c.(a)

Reg. Lib. A. 1841, fol. 1464.

(a) An appeal from this decree is pending before the Lord Chancellor.

*CUTTS v. THODEY.

[*206]

Conditions of Sale.—Waiver.—Vendor and Purchaser.—Parties.—Pleading.—Specific Performance.

1842: 19th November and 3d December.

Conditions of sale stipulated that the sale should be completed on a certain day; and that objections to the title not made within twenty-one days from the delivery of the abstract, should be considered as waived; and that, if the purchaser should not comply with the conditions, his deposit should be forfeited, and the vendor be at liberty to resell the property. The purchaser did not deliver his objections until several weeks after the expiration of the twenty-one days, and after the day appointed for completing the purchase: the vendor's solicitor, however, received them, and entered into a long correspondence with the purchaser on the subject of them, but without coming to a satisfactory conclusion. Finally, the vendor resold the property, (but at a less price,) notwithstanding the purchaser protested against the resale, and gave notice to the vendor of his intention to file a bill to enforce the contract. About six months afterwards he filed his bill, making the auctioneer and the purchaser at the resale, to whom he had, some months before, given notice of his prior contract, co-defendants to it. The court held that the benefit of the conditions had been waived by the vendor's solicitor, and decreed a specific performance, with a reference to the master as to title; and dismissed the bill with costs, as against the auctioneer, because he denied that he had ever intended to part with the deposit, and without costs as against the purchaser at the resale, who claimed the benefit of his contract, if the court should think that the plaintiff's ought not to be performed.

Where objections to title are to be considered as waived, unless made within a certain time after the delivery of the abstract: *Qu.* whether that condition can be insisted on, if the abstract is very defective?

ON the 19th of June, 1835, the defendant Thodey, sold, by auction, to the plaintiff, a cottage, garden, stabling and blacksmith's shop at Whetstone, Middlesex, for 670*l.*; and the plain-

 1842.—*Cutts v. Thodey*.

tiff paid the defendant Hoggart, the auctioneer, a deposit of 134*l*., and signed an agreement for payment of the remainder of the purchase money *on or before the 29th September then next*; but if the completion of the purchase should be delayed beyond that day, then the plaintiff was to pay interest **at* five per cent. on the balance of his purchase money until the purchase should be completed.

The sixth condition of sale was that, if a valid objection should be made to the title, *within twenty-one days after the delivery of the abstract*, or, if the purchaser should require evidence in support of it which should not be in the vendor's possession, the vendor should be at liberty to rescind the contract on returning the deposit, with interest, in full satisfaction of the claim of the purchaser: "*but all objections to the title not made within the period aforesaid shall be considered as waived.*" The last condition was that, if the purchaser should neglect or fail to comply with the conditions, the deposit should be forfeited, and the purchaser be at liberty to resell the premises; and that the deficiency on the resale, together with the charges attending the same, should be made good by the purchaser.

On the 17th of July, 1835, Thodey's solicitor, Mr. Cox, delivered an abstract of the title to the premises, to the plaintiff, who also was a solicitor; but the latter did not, within twenty-one days after that day, nor, indeed, until some time in December following, state any objection to the title; whereby, the answer alleged, *he waived all right of objecting thereto*. During the interval, Mr. Cox wrote several letters to the plaintiff, complaining that he had received no communication from the plaintiff respecting the abstract, and requesting to hear from him on the subject. In one of those letters, which was dated the 30th of September, 1835, he stated that, the time for completing the purchase having expired, Thodey threatened to resell the premises under the last condition, unless he heard satisfactorily, from the plaintiff, in the course of the week. On the 3d of **November*, the plaintiff informed Cox that the papers were before his conveyancing counsel, and that, on the next day after he

1842.—Cutts v. Tholey.

received them again, he would communicate with Cox. On the following day Cox wrote to the plaintiff, as follows: "Had the explanation which you now give been afforded in a much earlier stage of the business, and without waiting for four or five letters being written before any answer being given, I should be disposed to agree that, in fairness, a resale ought not to be resorted to so early after the time appointed for completion: but, seeing that the abstract has now been delivered near four months, and that the time for completion has passed by near six weeks, and no single step taken towards completion, I confess that there seems to me no ground for your being surprised at the contents of my last letter. I do, however, after the great delay that has taken place, hope that you will, at least, spare me from personal annoyance in the matter, by favoring me with the earliest communication on the business." On the 4th of December, 1835, the plaintiff sent Mr. Cox a copy of his counsel's opinion upon the title: in consequence of which, Mr. Cox, on the 31st of that month, sent the plaintiff an abstract of the proceedings in a Chancery suit, mentioned in the former abstract, accompanied by a letter, in which, after referring to the sixth condition, he said that he sent the further abstract *without prejudice*. He, however, urged the plaintiff to examine the title deeds of the premises, and to furnish him with the remarks and queries made, by counsel, in the margin of the first abstract: and, accordingly, the plaintiff sent him the abstract on the 9th of February. Many other letters passed between Cox and the plaintiff, relative to the objections and requisitions of the plaintiff's counsel; until, on the 3d of April, 1837, Cox required the *plaintiff to deter- [*209] mine whether he accepted the title as shown, or not, and added that, unless he heard from the plaintiff, in the affirmative, in the course of the week, the deposit would be treated as forfeited, and the premises be resold under the last condition. The plaintiff having paid no attention to that letter, the premises were advertised to be resold on the 12th of May; and, on the 2d of that month, Cox sent the plaintiff a copy of the particulars and conditions of the resale. On the 10th the plaintiff wrote to Hoggart, by whom the premises were to be resold, informing him how the matter stood with respect to the title, and warning him not

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to resell the premises, and to hold the deposit until the title should be completed: and, on the next day, the plaintiff wrote to Cox, protesting against the resale, and stating that he was about to file a bill against Thodey, to compel him to perform the agreement. The resale, however, took place on the 12th, when the premises were purchased by the defendant Vickers for 640%. In June following, the plaintiff gave Vickers notice of his prior contract, and of his intention to insist on the completion of it: and, on the 29th of December he filed his bill, praying for a specific performance of his contract, and for an injunction to restrain Thodey from proceeding with an action which he had brought, against Hoggart, to recover the plaintiff's deposit, and to restrain Hoggart from paying the deposit to Thodey.

Hoggart denied that he had threatened or that he intended to part with the deposit; and submitted that he was entitled to retain out of it, or to be otherwise paid his charges and expenses of the sale in 1835 and his costs of the suit.(a)

[*210] *Vickers submitted whether the plaintiff's agreement was valid and subsisting; and, if it was, that he was entitled to have his deposit and what he had paid for auction duty, repaid to him with interest; but if it was not, he claimed the benefit of his own contract, and insisted on his right to call on Thodey to complete it.

The cause now came on to be heard.

Mr. *Lee* and Mr. *Heathfield*, for the plaintiffs, contended that as Thodey had, by his solicitor, received the plaintiff's objections to the title and delivered a further abstract, long after the twenty-one days from the delivery of the original abstract had expired, and had, subsequently, entered into a lengthened discussion of those objections with the plaintiff, he had waived the benefit of the conditions of sale, and, consequently, was not entitled to resell the premises, but ought to be decreed to perform his contract

(a) Hoggart filed a bill of interpleader respecting the deposit. See *Hoggart v. Cutts*, 1 Craig & Phill. Rep. 197.

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with the plaintiff. They cited *Tanner v. Smith*,^(a) *Reynolds v. Nelson*,^(b) *Hipwell v. Knight*,^(c) and *Hobson v. Bell*.^(d)

Mr. *Stuart* and Mr. *Wood*, for Thodey, cited *Heaphy v. Hill*,^(e) and *Watson v. Reid*.^(g)

Mr. *Rogers* appeared for Hoggart; and

Mr. *Rasch* for Vickers.

THE VICE-CHANCELLOR:—I will read over the correspondence between the plaintiff and Mr. Cox, before I decide the case. I conceive *that I am not at liberty to [*211] look into the abstract, in order to see whether it is so defective that it ought to be considered as no abstract.

December 3d.—THE VICE-CHANCELLOR:—It seems to me, after the correspondence which took place between the plaintiff and Mr. Cox, which commenced in September, 1835, and continued until April, 1837, that there ought to be a decree for a specific performance.

What Mr. Cox meant by the words, "without prejudice," in his letter of the 31st of December, 1835, it is not easy to determine; for he had long before waived the benefit of the sixth condition of sale.

The bill must be dismissed, as against Mr. Hoggart, without costs; for he denies, in his answer, that he ever threatened or intended to pay over the deposit to Mr. Thodey; and the bill must be dismissed with costs as against Mr. Vicker. There

(a) *Ante*, Vol. X, p. 410.

(b) *Madd. & Geld* 18.

(c) 1 *Youn. & Coll* 41.

(d) 2 *Beav.* 17. See *Morley v. Cook*, 2 *Hare*, 106.

(e) 2 *Sim. & Stu.* 29.

(g) 1 *Russ. & Myl* 236.

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must be a decree for a specific performance as against Mr. Thodey, with a reference to the master as to the title.

The plaintiff appealed, to the Lord Chancellor, from that part of the decree which directed the bill to be dismissed as against Hoggart with costs, and as against Vickers without costs and prayed that the bill might be retained as against those defendants: or, in case his Lordship should be of opinion that the decree was right in dismissing the bill as against Hoggart with costs, that the consideration whether those costs ought to be ultimately borne by the plaintiff or by Thodey, might be reserved.

The appeal was heard on the 18th of February, 1844, when his Lordship affirmed the decree with costs.(a)

(a) See 1 Collyer's Rep. 223.

WILSON v. SQUIRE.

Legacy.—Costs.

1842: 24th November.

In a suit for administering a testator's estate, a legacy was claimed by two legatees, adversely to each other. Held that, as the question arose on the testator's will, the costs must be borne by his estate, and not by the legacy.

THIS suit was instituted for the administration of the estate of Thomas Hill, deceased. By his will he gave a legacy of 1,000*l.* three per cents. to the governors and trustees of the London Orphan Society, in the City Road. Two charitable institutions, namely, the Orphan Working School, in the City Road, and the Orphan Asylum at Clapton, Middlesex, claimed the legacy, adversely to each other, before the master. The master decided in favor of the latter institution, because the testator had been a

1842.—The Attorney-General v. Christ church.

subscriber to it. But, upon exceptions being taken to the master's report, the court decided in favor of the former: and, on the hearing of a petition presented by the treasurer for payment of the legacy, the question was whether the costs ought to be borne by the legacy or paid out of the testator's residuary estate.

Mr. *Blower*, for the petitioner, cited *Orogon v. Baines*,^(a) and *Ripley v. Moysey*.^(b)

Mr. *Wood*, for the residuary legatees, said that they did not contend that the legacy was not payable, *but [*218] that the question was between the two adverse claimants of the legacy: he cited *Jenour v. Jenour*,^(c) and *Angell v. Davis*.^(d)

Mr. *Rolt* also appeared upon the petition.

THE VICE-CHANCELLOR:—If a fund is separated from the bulk of the testator's estate, and then a question arises about it, the fund pays the costs. But if the question is who is entitled to the fund in the first instance, that question is raised by the testator himself, and his estate must bear the costs; for a testator's estate bears the costs of all the questions that arise on his will respecting it. In this case, therefore, the costs of all parties must be paid out of the estate.

(a) *Ante*, Vol. VII, p. 40.

(c) 10 Ves. 562.

(b) 1 Keen, 578.

(d) 4 Myl. & Cr. 360.

*THE ATTORNEY-GENERAL v. THE DEAN AND CHAP- [*214]
TER OF CHRIST CHURCH, OXFORD.—EX PARTE
MADDOX.

Vendor and Purchaser.—Interest.—Allotment.

1842: 24th November.

Under an enclosure act, an allotment had been made to the impropriator, in lieu of tithes; and, by the act, the tithes were to cease on the allotment being made;

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but the act did not authorize the sale of allotments before the execution of the award. In the interim, the impropiator agreed to sell his allotment for 700*l*., to be paid on the 25th of March then next, on a good and valid title being made and executed. The award was not made until several years after the agreement; but the purchaser had been, all along, in possession of the allotment. The court ordered him to pay four per cent. interest on his purchase money from the 25th of March next, after the date of agreement, although a good title could not be made until the award was executed.

By an act of Parliament, passed in 1813, for enclosing lands in the parish of Prior's Ditton in Shropshire, the commissioner was directed to make allotments to the impropiator and vicar, in lieu of the tithes to which they were entitled respectively; and it was enacted that, when such allotments should be staked and set out, the tithes, in respect of which they were made, should cease and be no longer payable. The act, however, did not empower the persons to whom allotments should be made, to sell and convey them before the execution of the award.

The commissioner, in pursuance of the act, allotted about thirty acres, part of a farm in the parish, to the impropiator, in lieu of the great tithes of that farm; and in August, 1814, the impropiator agreed to sell the allotment to the owners of the farm, for 700*l*., to be paid on or before the 25th of March then next, *on a good and valid title being made and executed*; and the expense of the conveyance was to be borne by the parties equally.

[*215] * At the date of the agreement, the owners of the farm were, and had ever since continued, in the possession or receipt of the rents of the allotted lands. The commissioner did not execute his award until the 3d of May, 1841. The impropiator had received no tithes during the interval.

On the hearing of a petition, presented by the impropiator, praying for a declaration that he was entitled to be paid the 700*l*. with interest at 4*l*. per cent. from the 25th of March, 1815, the day named in the agreement for completing the purchase, the question was, whether he was entitled to receive such interest, or only the amount of the rents received by the purchasers in respect of the allotment.

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Mr. *Wakefield* and Mr. *Faber*, for the petitioner, said that there was nothing to take the case out of the general rule, that a purchaser taking possession must pay interest on his purchase-money. *Kingsley v. Young* ;(a) *Powell v. Martyr* ;(b) *Fludyer v. Cocker* ;(c) *Doe v. Willis* ;(d) *Doe v. Saunder*.(e)

Mr. *Stuart* and Mr. *Hodgson*, for the purchasers, said that they had not *taken* possession of the allotment, but had only *continued* in the possession of it which they had at and before the date of the agreement; that, by the agreement, the purchase-money was not to be paid until a good and valid title should be made and *executed*; which meant until a conveyance should be executed; but, as the act did not authorize allotments made under it to be conveyed before the award was executed, *no [*216] conveyance could be made of the allotment in question, until after the execution of the award; and therefore, at any rate, the purchaser was not entitled to be paid interest on his purchase money from an earlier time than the date of the award. *Farrer v. Billing* ;(g) *Ellis v. Arnison*.(h)

Mr. *Stinton* and Mr. *Chandless* appeared for other parties.

Mr. *Wakefield*, in reply, referred to *Burton v. Tbdd*.(i)

THE VICE-CHANCELLOR:—I cannot but think that interest ought to be paid on the 700*l.* from the 25th of March, 1815.

The purchasers were in possession of their own lands; and then an allotment of a portion of those lands was made to the impropiator, in lieu of the tithes of them. Now, by the express provision of the act of Parliament, the tithes were to cease from the staking out of the allotment; so that the impropiator lost the tithes from that time. The purchasers were in possession; and, by the very terms of the agreement, they would have the possession, from the month of August up to March, 1815, with-

(a) 17 Ves. 468, and 18 Ves. 207.

(b) 8 Ves. 146.

(c) 12 Ves. 25.

(d) 5 Bing. 441.

(e) 5 Adol. & Ell. 664.

(g) 2 Barn. & Ald. 171.

(h) 5 Barn. & Ald. 47.

(i) 1 Swanst. 265.

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out paying any rent: nothing was to be paid by them during that time. The purchase money was to be paid on or before the 25th of March then next ensuing, on a good and valid title being made and executed. That might have had reference to a variety of things, independently of the mere making of the award; because there might have been such a dealing, [*217] by the impropiator, *either after or before the allotment was staked out, as would have had the effect of incumbering the title. For there can be no doubt that, although he might not have been able to make a valid conveyance of the allotment before the award was executed, he might have contracted, in various ways, so as to bind the allotment. Therefore, it was very reasonably provided by the agreement that the purchase money should be paid on a good title being made. But I do not think that that provision means that the money is to be paid without interest, on a good title being made at any time, however distant. But, according to the view that I take of it, it means nothing more than that, if a good and valid title should be made and executed on the day named in the agreement, the purchase money should be paid on that day, and then without interest.

It turned out that a good and valid title could not be made on the day named: but, ultimately, it appears that a good and valid title can be made. Therefore, I apprehend that the vendor must, according to the common course of the court, receive interest at 4l. per cent. on the purchase money, from the day named in the contract for completing the purchase.

Order made according to the prayer of the petition, but without costs.

1842.—Bartlett v. Green.

*BARTLETT v. GREEN.

[*218]

Marriage Settlement.—Deed.—Construction.—Term.

1842: 5th December.

A marriage settlement, after reciting that it had been agreed that a cottage, &c. (which the husband held for the remainder of a term of 2,000 years) should be settled on the husband for life; and, after his decease, on the wife for life, by way of jointure, and, after their several deceases, on the issue of the marriage, and, in default of issue, on W. C. and his heirs, executors, &c., assigned the cottage to a trustee for the remainder of the term, in trust to permit the husband to receive the rents for so many years of the term as should expire in his lifetime; and, after his decease, in trust to permit the wife to receive the rents during her natural life, and, after their several deceases, to permit the heirs of the body of the husband, begotten on the body of the wife, to receive the rents for so many years of the term as should expire in the life or lives of him, her or them respectively, and, after the several deceases of the husband and wife, and, in default of issue of the body of the husband and wife as before limited, to permit W. C., his heirs, executors, &c., to receive the rents for all the residue of the term. Held that the term vested in the husband absolutely after the first limitation.

By an indenture, bearing date the 16th February, 1758, and made between Edith Cossens, since deceased, the widow and executrix of Barjew Cossens, and John Cossens and William Cossens, the two sons of Barjew and Edith Cossens, of the first part, Margaret Crofts, spinster, of the second part, and John Everett of the third part, being the settlement made in contemplation of the marriage of John Cossens with Margaret Crofts, after reciting that Barjew Cossens died seised of all that cottage, dwelling-house and closes, with their appurtenances situate in Portesham, in the county of Dorset, after more particularly mentioned, and which he held for the remainder of a term of 2,000 years, without impeachment of waste, under the yearly rent of one pepper-corn: and that Barjew Cossens, by an indenture of mortgage, conveyed the premises to William Clark of Abbotsbury in the said county, yeoman, with a proviso to be void on payment of 120*l.* and interest: and that Barjew Cossens, by his will, bearing date the 20th March, *1743, devised the premi- [*219] ses to Edith Cossens, his then wife, for her life, and, after her decease, to John Cossens, his son, in tail, with the re-

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mainder of the said term to William, his other son, and his heirs forever; and that a marriage was shortly to be solemnized between John Cossens and Margaret Crofts; and that it was agreed that all the premises, subject to the mortgage for 120*l.* and interest, should be settled *on John Cossens for his life, and, after his decease, on his intended wife for her life, by way of jointure, and, after their several deceases, on the issue of the marriage, and, in default of such issue, on William Cossens and his heirs, executors and administrators*, during the remainder of the said term of 2,000 years that should be then to come: It was witnessed that, in the performance of the said agreement, and in consideration of the intended marriage, Edith Cossens, John Cossens and William Cossens granted, bargained, sold, assigned and set over to John Everett, all that cottage, dwelling-house, &c. To hold the same unto John Everett, his executors, administrators and assigns, from and after the solemnization of the marriage, during all the residue of the term of 2,000 years therein then to come and unexpired, upon trust, in the first place, for the said John Everett, his executors and administrators, to raise, by assignment of the remainder of the term of 2,000 years, as much money as then should be or grow due for principal and interest on the mortgage, and to pay the same in discharge of the 120*l.* principal, with all interest that should be due on the mortgage to William Clark, and, from and after the payment of the 120*l.* principal and interest, then in trust to permit and suffer *John Cossens to receive the rents, issues and profits of the premises for so many years of the term as should* [*220] *expire in his lifetime, and, from and after the decease *of* John Cossens and subject to the mortgage, (a) to permit and suffer Margaret Crofts, the intended wife, *to receive the rents and profits of the premises during her natural life, for her jointure, and, from and after the several deceases of John Cossens and Margaret, his intended wife, and subject as aforesaid, to permit and suffer the heirs of the body of John Cossens begotten on the body of Margaret, his intended wife, to receive the rents, issues and profits of the premises for so many years of the term as should expire in the life or lives of him, her or them respectively, and from*

(a) So in brief.

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and after the several deceases of John Cossens and Margaret, his intended wife, and, *in default of issue of the body of John Cossens and Margaret as before limited*, and subject as aforesaid, to permit and suffer William Cossens, his heirs, executors and administrators, to receive and take the rents, issues and profits of the premises for all the residue of the term as should be then to come and unexpired.

The marriage was solemnized soon after the date and execution of the indenture, and there was issue thereof three children, Barjew Cossens, who was the eldest son, Elizabeth Cossens, afterwards Elizabeth Green, and the defendant Henry Cossens.

John Cossens died in possession of the premises in 1788. Margaret Cossens, his widow and executrix, then entered into possession of them. Barjew Cossens, the son, died in 1703, leaving the plaintiff Elizabeth Bartlett, widow, his only child; and she took out letters of administration to his estate.

Elizabeth Green died intestate in 1823, leaving John Green, her husband, and the defendants Richard and William Green, her only children her surviving.

*Margaret Cossens died in 1827: John Green was [*221] her executor.

The bill alleged that, on the death of Margaret Cossens, the plaintiff became entitled to the premises as heir of the body of her father begotten on the body of her mother; but that John Green got into possession of the premises, and continued in possession until his death. He died in 1830: his sons Richard and William were his executors, and, as such, the personal representatives of John and Margaret Cossens. On the death of John Green, his two sons entered into and they still were in possession of the premises. Some time after Elizabeth Green's death, letters of administration to her effects were granted to the defendant Morgan.

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The bill prayed that it might be declared that, upon the death of Margaret Cossens, the plaintiff became entitled to the premises *for the remainder of the term of 2,000 years*, and that Richard and William Green might account for, and pay to the plaintiff, the rents of the premises which they and their father had received, and might deliver up to her the possession of the premises.

Henry Cossens submitted whether, according to the true construction of the settlement, he was entitled to any interest in the premises as one of the children of John and Margaret Cossens.

Richard and William Green submitted whether, if any person or persons became entitled to the premises under the limitation, in the settlement, to the heirs of the body of John Cossens, they became entitled thereto for any greater estate than for [*222] life only; and whether, subject *thereto, the premises did not become the property of John Cossens.(a)

(a) In 1827, the following questions arising on the settlement in the above case, were submitted to an eminent counsel, now holding a high judicial office:—

Whether the limitation, in the settlement of 1758, upon the decease of the survivor of John Cossens and Margaret, his wife, in trust for the heirs of that marriage, is good or void. If void,

Whether the estate must not be divided according to the Statute of Distributions. And if good,

Whether the words, "heirs of the body," &c., must be taken to mean children: or

Whether the heir at law of John Cossens (who is Elizabeth Bartlett) is entitled to the whole.

If you should be of opinion that the limitation is valid, and means children of the marriage,

Whether the estate should go to the surviving child, Henry, solely, or to him and the representatives of Barjew and Elizabeth, who died in the lifetime of their mother?

Opinion.

The limitation to the heirs of the body was valid.

But it is difficult for counsel to say what is the true construction of the limitation. According to the principle upon which *Peacock v. Spooner* (2 Vern. 195) was decided in the House of Lords, followed by *Dafforne v. Dafforne*, (2 Vern. 362,) the words "heirs of the body," are words of purchase; but in *Webb v. Webb*, (1 P. Wms. 132,) the court escaped from the rule, as the circumstances were not precisely similar; but the reasoning of the Lord Keeper, in the latter case, was erroneous; and the deci-

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*Mr. Teed and Mr. Roll for the plaintiff:—We con- [*223]
tend, first, that the words "heirs of the body" are to
be considered as words of purchase, and not of limitation: for the
settled property was not real estate, but a term of years; and, if
it had been real estate, the rule in *Shelley's Case* would not have
applied, as John Cossens would not have taken an estate of free-
hold, but an interest for years. There can be no doubt, in this
case, about the intention of the parties to the deed; for it was a
marriage settlement; and, moreover, it recites that the parties
had agreed that the property should be settled, after the several
deceases of the husband and wife, *on the issue of the marriage*.
Therefore the court cannot apply the rule in *Shelley's Case*,
(which is a mere technical rule,) without defeating the intention
of the parties, not only as it is to be inferred from the nature of
the instrument, but as it appears on the face of it. The cases of
Peacock v. Spooner(a) and *Dafforne v. Goodman*(b) so closely re-
semble the present, that the court cannot hold that the words
"heirs of the body," in this case, are words of limitation, without
overruling those two cases, the former of which was decided by
the House of Lords. In that case a term of 900 years was as-
signed in trust to permit the husband and wife, and the survivor
of them, to receive the profits for so many years as they or the
survivor of them should happen to live, and, after their deaths,
to the use of the heirs of the body of the wife by the husband to
be begotten; and the House of Lords held that the term

*did not vest absolutely in the wife, who survived her [*224]
husband, but that the heir of the body took it by pur-
chase. The case of *Dafforne v. Goodman* was as follows: a term
was assigned in trust to permit J. to receive the profits for so
many years of the term as he should live, and, after his death,

sion in the House of Lords must be binding until reversed there. Here, too, the in-
tention is manifest from the recital.

In general, the person who answers the description of heir of the body, would
alone take; but, upon the words in this deed, I strongly incline to think that all the
children would take as joint tenants; and, if so, the whole has survived to Henry.
He is, however, I apprehend, under the words of the settlement, entitled for life
only. The reversionary interest, in that view, belonged to the father.

(a) 2 Vern. 43 & 195; S. C., 2 Freem. 114.

(b) 2 Vern. 362, and 2 Freem. 231.

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to permit A., his intended wife, to receive the profits for so many years of the term as she should live, and, after both their deaths, to permit the heirs of the body of A., to be begotten by the said J., to enjoy the lands for the residue of the term: and the court held that the heir of the body took by purchase. *Theobridge v. Kilburn*,^(a) *Hodgson v. Bussey*,^(b) *Doe v. Laming*.^(c)

Secondly, the words "heirs of the body," though applied to personalty, must be taken in their correct and legal sense, and not as meaning either "issue," or "next of kin." *Mounsey v. Blamire*.^(d)

Thirdly, the period at which the person to take was to be ascertained, was the death of Margaret Cossens, who survived her husband, John Cossens.

Lastly, under the limitation to the heirs of the body of the father and mother, the person who answered the description at the death of the surviving parent, took an absolute interest, and not an interest for life only. For, first, a limitation to the heirs of the body of A., serves a double purpose: it denotes not only the person to take, but also the quantity of interest that he is to take. *Mandeville's Case*,^(e) *James v. Richardson*.^(g) [*225] *And the words: "for so many years as shall expire in the lifetime of him, her or them," are mere surplusage: for they express nothing more than is contained in the word "heirs," namely, that heirs to the remotest degree shall take so long as they shall be in existence. But if those words were meant to restrain the heirs from alienating as they successively come into possession, they are futile; *Doe v. Stenlake*.^(h) Secondly, the words: "and in default of issue as before limited,"

^(a) 2 Vez. 233.

^(b) 2 Atk. 89.

^(c) 2 Burr. 1100.

^(d) 4 Russ. 384, and the passage cited from 14 Vin. Ab. in the note to that case.

^(e) Co. Litt. 26 b.

^(g) 2 Lev. 232.

^(h) 12 East, 515.

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refer not to the issue of John and Margaret Cossens, but to the immediately preceding limitation to the heirs of the body of John and Margaret, that is, to the issue of the heirs of their body; and, therefore, those words add strength to the argument founded on the previous part of the clause: *Clare v. Clare.*(a)

Mr. *Stuart* and Mr. *Stinton* for the defendants, Henry Cossens and Morgan, contended, as the plaintiff's counsel had done, that the words "heirs of the body" must be taken to be words of purchase, and not of limitation, according to the decision of the House of Lords in *Peacock v. Spooner*, which was followed in *Dafforne v. Goodman*, a case precisely similar to the present: that, in *Webb v. Webb*,(b) Lord Keeper Harcourt could not overrule, nor, indeed, did he profess to overrule the decision of the House of Lords in *Peacock v. Spooner*; but said that the two cases differed from each other, in several material circumstances: that Mr. *Fearne* was of opinion that *Peacock v. Spooner* must be followed: "in cases exactly the same *in specie* with itself, as was that of *Dafforne v. Goodman*, *as reported [*226] by Freeman:"(c) and the case now before the court was the same *in specie* as *Dafforne v. Goodman*.

They then argued, from the recital in the settlement, and from the words in the operative part: "for so many years of the term as shall expire in the life or lives of him, her or them," that the words: "heirs of the body," meant the children of the marriage, and that they must take as joint tenants for life; and that there was a resulting trust, as to the reversionary interest in the term for John Cossens; and, as it did not pass by his will, that his next of kin, according to the Statute of Distributions, were entitled to it.

Mr. *Bethell* and Mr. *Prior* appeared for William and Richard Green: but—

(a) Ca. Temp. Talbot, 21.

(b) 1 P. W. 132.

(c) Ex. Dev. 493, 6th edit.
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The VICE-CHANCELLOR, without hearing them, said :—The question is whether there is any distinction between this case and *Webb v. Webb*: and I confess that I do not see how it can be distinguished from that case, except by saying that the limitation in trust to permit and suffer John Cossens to receive the rents, issues and profits of the premises for so many years of the term as should expire in his lifetime, is not equivalent to a limitation to him for life. But it is plain that, in *Peacock v. Spooner*, the limitation in trust to permit the husband and wife, and the survivor of them, to receive the profits for so many years as they, or the survivor of them, should happen to live, was considered, [*227] *by all the learned persons who had to decide upon that case, as a limitation to the husband and wife for their lives, and to the survivor of them for his or her life. And Lord Harcourt, in observing upon that case in his judgment in *Webb v. Webb*, does not notice, as one of the circumstances in which it differed from *Peacock v. Spooner*, that the words in the latter case did not give a life estate to the husband and wife: but he takes it for granted that the words in that case, and also in *Dafforne v. Goodman*,^(a) were equivalent to a limitation for life. Therefore he, in effect, overruled the authority of those cases.

Mr. *Fearne*, speaking of the case of *Webb v. Webb*, says: "This last case appears to have been the ruling authority ever since, in cases of the like nature; and that of *Peacock v. Spooner*, it seems, is only attended to in cases exactly the same *in specie* with itself, as was *Dafforne v. Goodman*, as reported by Freeman."

It is a singular circumstance that the settlement, which is a piece of great nonsense, begins with reciting that Barjew Cossens died *seised* of the estate, and then treats it in substance, as a freehold estate, and as passing by a freehold conveyance. But, after the decision in *Webb v. Webb*, I must look at the limitations of the settlement; and as I find that it contains a limitation which, in effect, is a limitation to the husband for life, I must

(a) Lord Harcourt does not notice *Dafforne v. Goodman*.

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hold that, under that limitation, the term vested in the husband absolutely.

Bill dismissed with costs.(a)

(b) The decree has been appealed from.

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Covenant.—Lessor and Assignee.

1842: 12th November and 5th December.

A, an owner of land in the township of S., entered into articles of agreement with B., the lessee of a neighboring colliery, by which he agreed to grant to B. a lease of part of the land for the purpose of forming a railway for the conveyance of coal to certain wharfs; and B., for himself, his executors, administrators and assigns, agreed with A., his heirs and assigns, to convey upon the railway, all the coal to be gotten from the colliery, or from any other lands or grounds in the township, and to pay to A., his heirs and assigns, two pence for every ton of coal so conveyed. B. assigned his interest in the colliery and in the lands taken, under the articles of agreement, for forming the railway, together with the use of the railway, to C. Held that the agreement to convey, upon the railway, all the coal, &c., and to pay two pence per ton in respect of it, ran with the land, and, consequently, that it was binding on C.

By an indenture dated the 26th of July, 1833, and made between John Hatfield, Esq., of the one part, and J. C. Harter and William Harter of the other part, Hatfield demised to J. C. Harter and William Harter, their executors, administrators and assigns, all that mine, seam, vein or bed of coal, called the Stanley Main bed, and all such other beds or seams of coals as should be found or passed through in sinking to, working and getting the said Stanley Main coal, within or under the several closes or parcels of land or ground therein mentioned, situate in the township of Stanley-cum-Wrenthorpe, in the parish of Wakefield and county of York, with the usual powers for enabling the lessees, their executors, administrators and assigns, to get and work the demised beds, veins or seams of coal; to hold the same premises unto the lessees, their executors, administrators and assigns, from

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the day next before the day of the date of the indenture, under the rents and covenants thereby and therein reserved and contained: and the lessees, their executors, administrators and assigns, were empowered, with Hatfield's consent, to work and get the Stanley Main bed lying under any lands in Stanley, not the property of Hatfield, and not comprised in the indenture; [*229] by means of any of the works to be *made or used under the authority of the indenture, on payment of a certain acreage rent in addition to the rent thereby reserved in respect of the coal lying under Hatfield's lands.

By articles of agreement dated the 27th of July, 1833, and made between John Lee and the plaintiff of the one part, and J. C. Harter and W. Harter of the other part, after reciting that the Harters were the lessees of the mines, beds or seams of coal within and under certain closes, lands and grounds, belonging to Hatfield, situate at or near Stanley-lane-end, in the township of Stanley-cum-Wrenthorpe, in the parish of Wakefield and county of York, which mines, &c., they were about to win and work; and, being desirous to lay a railway from the said intended colliery, to communicate with the Lake Lock railway, at or near to Bottom Boat, in the said township, had requested Lee and the plaintiff to grant them a lease of the lands and grounds thereafter mentioned, for the purpose of making such railway, and the use of a convenient staith or wharf at Bottom Boat, for the shipping of coals from the said colliery, or from any other lands or grounds in the township, or for the conveyance of merchandise or other articles (except limestone) to be used for the works of the colliery: Lee and the plaintiff agreed to let, and the Harters agreed to take, for twenty-one years from the date of the agreement, such parts of the closes, lands, wharfs and grounds, in the township thereafter described, as should be necessary for the purpose of making the railway; together with full and free liberty, power and authority for the Harters, their executors, administrators or assigns, to make such railway, in manner thereafter mentioned, upon and over the said lands, wharfs and grounds, for the carriage and conveyance of all such coal [*230] as should, *at any time during the term, be worked,

wrought or gotten by the Harters, their executors, administrators or *assigns*, in or from the said colliery, or in or from any other lands or grounds in the township, and for the conveyance of lime, coke, wood and such other merchandise, except limestone, as the Harters might find necessary for the use of the colliery, or for the conveyance of other articles, except limestone, to be so used by the Harters at or about the said colliery; saving, nevertheless, and reserving to Lee and the plaintiff, their heirs and assigns, tenants, agents, servants, workmen, and others by their authority, the right of crossing the intended railway, either with or without cattle, carts or carriages, or for the purpose of making any drain, water-course, culvert or road, or for any other purpose whatsoever, when, where and so often as they should find it necessary or think proper; and also saving and reserving, to Lee and the plaintiff, their respective heirs and assigns, the right to use the railway for the carriage and conveyance of coal, minerals, merchandise or other articles, (provided such privilege did not unnecessarily interrupt or interfere with the free use and passage of such coal, coke, wood and other merchandise, except limestone, from the said colliery of the Harters,) on payment, to the lessees, of such and the same charges, and subject to such and the same conditions as such articles were then or should thereafter, from time to time, be carried and conveyed upon the Lake Lock railway; and, for that purpose, to connect any other railway with the railway thereby agreed to be made: and, also, the like liberty and privilege for the Harters, their executors, administrators or *assigns*, to make and use two wharfs or staiths adjoining each other, not exceeding 138 feet in width in the whole, upon such part of the lands of *Lee and the [*231] plaintiff, on the south side of the lock adjoining the river Calder, at Bottom Boat aforesaid, as should be thereafter pointed out by Lee and the plaintiff, their heirs or assigns, for the purpose of delivering such coal into or on board of boats, barges or other vessels at that point: all which lands, grounds and privileges thereby agreed to be demised, should be held subject to the yearly rent of 6*l.* 6*s.*, to be paid by the Harters, their executors or administrators, to Lee and the plaintiff, their heirs or assigns, for every acre of land which the Harters, their execu-

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tors and administrators, should take or use for making the intended railway; and the Harters, their executors, administrators or assigns, also paying to Lee and the plaintiff, their heirs and assigns, such further rent or sum, not exceeding 2*d.*, for every ton of coal which should be gotten or worked in or from the colliery, or in or from any other lands or grounds in the said township, and which should be conveyed upon the intended railway or any part thereof, in pursuance of the agreement therein-after contained on the part of the Harters, their executors and administrators or assigns, as the lessors, their heirs or assigns, then received, or should, from time to time thereafter, receive from any other person or persons for the like privilege of making or using wharfs or staiths at Bottom Boat aforesaid: Provided, that if all the mines, beds or seams of coal demised to the Harters as aforesaid, or in such other lands or grounds as aforesaid, should be wholly got and wrought before the term of 21 years, then the term and the rent of 6*l.* 6*s.* per acre should cease. And the Harters, for themselves, their executors, administrators and assigns, agreed with Lee and the plaintiff, their heirs and assigns, that they, their executors, administrators and assigns, would, [*232] on or before the 1st day of January, *1835, complete the railway; and that, after the same should have been completed, they, their executors, administrators and assigns, would, at all times during the term, carry and convey all such part of the coal worked or gotten at or from the said colliery, or in or from any such other lands and grounds as aforesaid, as should be intended to be shipped or for water sale, upon the said railway, to the said delivery staith or wharf, or staiths or wharfs at Bottom Boat aforesaid, or to some other staith or wharf upon the land and grounds of Lee and the plaintiff, their respective heirs or assigns, and also would, from time to time during the said term, pay to Lee and the plaintiff, their heirs and assigns, the several rents or payments thereinbefore reserved, at the days appointed for the payment thereof: and also, that the Harters, their executors, administrators or assigns, would, immediately after the railway should have been made, make and afterwards maintain fences on both sides thereof, so as to prevent trespasses on the adjoining lands and grounds; and would also erect and continue gates at so many crossings over the railway

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as might be necessary for the convenient occupation of the lands and grounds, wharfs or buildings adjoining or near thereto; and also would, before the expiration or other determination of the term, or within six months then next following, remove the railway and the iron and other rails and materials thereof, and dig, trench and level the land over which the same should have been made, and leave all such land in the same order and condition as it was at the date of the agreement: Provided, that in case the Lake Lock railroad should be discontinued from the said junction with the intended railway, or if the Harters, their executors, administrators or assigns, should be desirous, at their own expense, to make any other staith or wharf adjoining the river Calder, in any other part of *the estate of Lee and the [*233] plaintiff, in the township, westward of a point mentioned in the agreement, to be used either along with or in lieu of the staith or wharf thereby agreed to be made or used at Bottom Boat, they should be at liberty so to do, and to make any diversion in the line of the intended railway, that might be necessary to connect the same with such new staith or wharf; but on condition that so much of the intended railway as might become useless in consequence of such diversion, should be removed, and the land on which the same should have been made, should be levelled and trenched in the manner before mentioned; and also that such new staith or wharf or diversion, should be under and subject to the same rents, payments, terms, conditions and agreements as were thereinbefore reserved and contained: Provided, also, that if, at any time before the expiration of the term of 21 years, the mines, beds or seams of coal belonging to Hatfield, and demised to the Harters, or in such other lands or grounds as aforesaid, should have been wholly wrought or gotten, or if a quantity to the extent of 5,000 tons, in any one year of the term, should not be actually carried upon the intended railway, or the sum of two pence per ton, as and for rent of 5,000 tons, should not be paid by the Harters, their executors, administrators or assigns, in any one year of the term, then Lee and the plaintiff, and their respective heirs and assigns might, by notice in writing, to be delivered to the Harters, their executors, administrators or assigns, or left at their usual places of abode, put an end to the articles of agree-

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ment and the lease to be made in pursuance thereof, at the expiration of twelve months next after the Harters, their executors or administrators, should, for the reasons thereinbefore mentioned or either of them, cease to carry the quantities of coals [*234] last thereinbefore mentioned, *upon the intended railway, or to pay the rent of two pence per ton thereon in any one year; and that, after the expiration of the twelve months from the delivery of such notice, the Harters, their executors or administrators, should remove the railway and other works thereby agreed to be made, and deliver up the possession of the lands and grounds thereby agreed to be let, in such and the same manner, in every respect, as they had thereinbefore agreed to do at the expiration of the term of 21 years: And, lastly, it was agreed between the parties that a lease and counterpart of the way leave, wharf and privileges thereby agreed to be let, made and used, should be immediately prepared and executed according to the terms and conditions thereinbefore expressed, and with such other clauses and stipulations as were usual in such leases, and necessary to carry the agreement and the intentions of the parties into effect.

Soon after the date of the articles of agreement, the Harters began to work the colliery, and entered upon the lands, grounds and wharfs or staiths therein mentioned, and laid down the railway thereon. In September, 1834, Lee sold and conveyed his moiety of the lands, &c., to the plaintiff.

In 1836, the Harters assigned their interest in the colliery and in the lands, &c., together with the use of the railway, to the defendants, their executors and administrators; and the defendants covenanted with the Harters, their executors and administrators, to pay the rents and sums of money reserved by the lease of the colliery and by the articles of agreement, and to perform the covenants and agreements therein contained respectively. On the 1st of November, 1836, the defendants began to work the colliery, and to use the railway and the wharfs or [*235] staiths mentioned in the *articles of agreement for the purposes therein mentioned, and they continued so to do

and to make the payments reserved by the articles, to the plaintiff, until the end of 1839.

The bill after stating as above, alleged that, since the 31st of December, 1839, the defendants had continued to work the Hatfield colliery and other mines and beds or seams of coal in the township of Stanley-cum-Wrenthorpe, which were granted or leased to them, by different persons, in 1837, and which, together with the Hatfield colliery, were called the Victoria collieries: but, instead of exclusively using, as by the articles of agreement they were bound to do, the railway and wharfs or staiths so laid down and constructed as aforesaid on the lands and grounds of the plaintiff, they, in breach of the stipulations contained in the articles, had made a partial use only of the said railway and wharfs or staiths, and had transported for the purpose of shipment or water sale, large quantities of coal obtained from the Victoria collieries, by another railway and by a totally different line or route, to other staiths on the river Calder at or near to Stanley Ferry in the township, and that they, thereby, sought to evade the payment of the dues to which the plaintiff was entitled at the rate of two pence per ton in respect of all coals intended to be shipped or for water sale, obtained from the Hatfield colliery, or any other mines, beds or seams of coal within the township.

The bill prayed that it might be declared that the plaintiff was entitled to the benefit of the articles of agreement entered into by the Messrs. Harter, and to call for a specific performance of the same from the defendants; and that the defendants might be ordered *to specifically perform the same, and [*236] to execute the counterpart of a proper lease of such part of the closes, lands, wharfs and grounds, described in the articles, as had been appropriated to or might be necessary or desirable for the purposes in the articles mentioned; the plaintiff being ready and willing to execute such lease, to the defendants, of the said premises, as should be necessary and proper for carrying the articles into effect: that an account might be taken of all coals which had been gotten by the defendants from the Victoria

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collieries, and all other collieries, mines and beds or seams of coal within the township of Stanley-cum-Wrenthorpe, and transported by them to the water side, or delivered by them to be shipped or for water sale, and of what was due to the plaintiff, in respect thereof, and that the same might be paid to the plaintiff by the defendants; and that, in the meantime, the defendants might be restrained from transporting, for the purpose of shipment or water sale, any coals obtained from the Victoria collieries, or from any other collieries or mines and beds of coal in the township of Stanley-cum-Wrenthorpe, to any other staiths or wharfs or other places on the water side, or by any other line of railway or other means of transit, than to such staiths and by such railway as were intended by the articles of agreement.

Mr. *Bethell* and Mr. *Shadwell* for the plaintiff, contended that the covenant in the articles of agreement, on the part of the Messrs. Harter, their executors, administrators and assigns, to carry all such coal gotten from the Hatfield colliery, or from any other lands or grounds in the township of Stanley-cum-Wrenthorpe, as should be intended to be shipped or for water sale, upon the railway therein mentioned, and to pay to Lee [*237] *and the plaintiff, the rents and payments thereby reserved, was a covenant that ran with the land, and, therefore, bound the defendants as the assigns of the Harters. *Vyryan v. Arthur*, (a) *Spencer's Case*. (b)

The *Solicitor-General*, Mr. *Stuart* and Mr. *Fbillet*, for the defendants, said that the word, "assigns," in the covenant referred to, meant "assigns of the colliery," and that it was plain, from the recitals and the general tenor of the articles of agreement, that the Harters, their executors, &c., were bound to carry on the railway, such coals only as should be raised from the Hatfield colliery: that the Harters might have assigned the colliery and kept the railway; or they might have assigned the railway to one person, and the colliery to another; and then, supposing the argument for the plaintiff to be correct, the landlord would lose

(a) 1 Barn. & Cres. 410.

(b) 5 Rep. 31 h.

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the two pence per ton; for the assignee of the railway would have no coals to carry upon it.

Secondly, that if the word, "assigns," meant "assigns of the railway," the covenant was not of such a nature as to run with the land; as it was not a covenant to do anything upon the land or actually affecting it; but to do something that was merely collateral to the land, that is, to carry coals over it. *The Mayor of Congleton v. Pattison*,^(a) and the observations of Lord Brougham, C., on *Vyryan v. Arthur*, in *Keppell v. Bailey*.^(b)

Thirdly, that the covenant was so harsh and injurious to the interest of the defendants, that the court ought not to enforce it. *Kimberley v. Jennings*.^(c)

*Fourthly, that the bill could not be sustained, be- [*238] cause it sought to make the defendants take a lease, and not an assignment of the lands and grounds mentioned in the articles; so that they would be liable in respect of the covenants in the lease during the whole of the term, and not so long only as they should hold the demised premises: that, at all events, the Harters ought to have been made parties to the suit, and the bill ought to have prayed that they might be decreed to take the lease, and afterwards to assign it to the defendants.

December 5th.—THE VICE-CHANCELLOR:—In this case the substantial question is, whether that covenant which relates to the mode of carrying the coal, which was to be obtained from the other collieries than those which were originally demised by Mr. Hatfield,^(d) is to be binding on the assignees or not.

It is observable that on the 26th of July, 1833, the demise was made, by Mr. Hatfield, to Messrs. Harter, of certain mines, seams or beds of coal under certain specified closes of land, all of which are described by their names and their quantities; and then

(a) 10 East, 130.

(b) 2 Myl. & Keen, 541.

(c) *Ante*, Vol. VI, p. 340.

(d) The covenant included the coal got from Hatfield's collieries.

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powers are given to erect works of various descriptions for the purpose of obtaining the coal under those lands; and then there was a proviso, contained in that instrument, that if the Harters, their executors, administrators or assigns, should with the consent of Hatfield, his heirs or assigns, work and get the mines or seams of coal, called the Stanley Main Bed, lying in and under the lands and grounds in Stanley aforesaid, not the property of Hatfield and not comprised in that demise, by means of any of the works to be made or used by or under the authority [*239] of or power contained in *that instrument, then they should pay a certain sum for every acre of such coal so got. That instrument having been made on the 26th of July, the instrument in question, which is in the form of articles of agreement, was made between Messrs. Lee and Hemingway of the one part, and Messrs. Harter, the lessees of Mr. Hatfield, of the other part. It recited that the Harters were the lessees of certain mines, beds or seams of coal within and under certain closes, lands and grounds belonging to Mr. Hatfield, and which mines, beds and seams of coal they were about to win and work; and that, being desirous to lay a railway from the intended colliery (that is, the colliery which was to be worked under the demise made by Hatfield,) to communicate with the Lake Lock Railroad, at or near Bottom Boat, they had applied to and requested Lee and Hemingway to grant them a lease of the lands and grounds thereafter mentioned, for the purpose of making such railway, and the use of a convenient staith or wharf for the shipping of coals from the said colliery or from any other lands or grounds in the township of Stanley-cum-Wrenthorpe, or for the conveyance of merchandise to be used for the works of the colliery. Now here there is a tacit reference to that which appears on the lease from Hatfield to the Harters, namely, not only were Hatfield's mines demised, but also reference was made to an additional rent in the event of the works on the Hatfield colliery, being applied in the winning of other coal than that which had been actually demised. Then the articles witness:—"that, for the considerations hereinafter mentioned, Lee and Hemingway have agreed to demise to the Harters, who have agreed and do hereby agree to take, for the term of twenty-one years, so

much and such parts of the closes, lands, &c., and also full and free liberty, power and authority for them, the Harters, their *executors, administrators and assigns, to make, [*240] lay and place such wagon railway." Now of what were the assigns here spoken of, to be assigns? It seems to me that, before we come to the consideration of the covenant, a necessary inference is here afforded us as to what was the meaning of the term "assigns," in the description which is used of the parties who were to take the liberty.

In going through this instrument, it will be found that the expression, "their executors, administrators and assigns," is used no less than thirteen times: and though I admit that the term "assigns" may, in some of those instances, mean not merely the assigns of the premises demised by Lee and Hemingway, but also the assigns of the colliery or of the other lands, (which it necessarily does,) yet, the fact that it may mean and include them as assigns in that character, is not exclusive of the word "assigns" necessarily bearing the meaning, the additional and the original meaning, of assigns of the premises demised by Lee and Hemingway.

Now this phrase is used several times, before the covenant is introduced. The instrument then proceeds thus: "For them, their executors, administrators and assigns, to lay and place such wagon railway for the carriage and conveyance of coals, during the term, to be worked, wrought or gotten by them, their executors, administrators or assigns, in or from the said colliery, or in or from any other lands." Now there is an instance in which the word "assigns" would seem to refer to their being the assigns of the colliery or of the other lands; but, of necessity, they are the same assigns as are before spoken of: and, where they are spoken of in the first place, they are, of necessity, the assigns of the *premises which had been agreed to be demised by [*241] Lee and Hemingway.

Then there is a saving clause; and then come these words: "and also the like liberty and privilege for them, the Harters,

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their executors, administrators and assigns, to make two wharfs," on which the same observation arises. Then the instrument says: "all which lands, grounds and privileges hereby agreed to be demised, shall be held at, under and subject to the clear yearly rent of 6*l.* 6*s.*, to be paid by the Harters, their executors or administrators." There the word "assigns" is left out. That was evidently a mere error; but it does not at all affect the meaning which the word "assigns" had previously received. Then it goes on: "For every acre of land which they, the said James Collier Harter and William Harter, their executors or administrators, shall take and use for the making of the intended railway; and the said Harters, their executors, administrators or assigns, also paying to Lee and Hemingway, their heirs and assigns, such further rent or sum, not exceeding two pence per ton, &c." Then there follows a proviso that, if the mines shall be worked out before the end of the twenty-one years, the lease shall terminate. Then comes the covenant on which the question arises.

Now it appears to me to be irresistibly clear that, in the previous part of the instrument, the term "assigns" must mean assigns of the thing demised. Then the question is whether it is altered by what follows: "and the Harters, for the considerations aforesaid, do hereby, for themselves, their executors, administrators and assigns, undertake and agree with Lee and Hemingway, their heirs and assigns, in manner following, that is to say, that [*242] they, the Harters, their executors, administrators *and assigns, shall and will, on or before the 1st day of January, 1835, complete the railway and afterwards maintain the same." Can any human being doubt what is the meaning of the word "assigns" in that place: "and that, after the same shall have been so made and completed, they, the Harters, their executors, administrators and assigns, shall and will, from time to time, and at all times during the term, carry and convey all such part of the coal worked or gotten at or from the said colliery, or in or from any such other lands or grounds as aforesaid, as shall be intended to be shipped or for water sale, on the railroad, to the delivery staith," and so on.

The same phrase: "executors, administrators or assigns," oc-

curs four times afterwards; and, in my opinion, there is not any doubt at all about the question. I do not see how a question can be fairly raised upon the meaning of the words; and it seems to me that this case does, expressly, fall within the second resolution in *Spencer's Case*.

Then it has been said that this is a harsh covenant: but it is no such thing. The agreement was made in 1833, and was acted upon, without the least reluctance, by the original lessees until the year 1836, when the Messrs. Harters assigned their interest to the defendants: and from 1836 to 1839, the covenant was acted upon, by the defendants, and no complaint was made until the Ayre and Calder Navigation Company bethought themselves of making that new improvement in the navigation of their river, which consisted in making a sort of canal which would pass by Bottom Boat and fall into the river Calder at a place below it. Then, to be sure, there was a method afforded, by breaking the *agreement and carrying the coal to Stanley Ferry, [*243] to save the lessees a vast deal of trouble and expense; and then the parties who had so long submitted to the agreement, discovered that it no longer bound them.

Now, though it may be true that the court will not execute a hard bargain, it must be a hard bargain in its own constitution. This is not a hard bargain. Besides, it should be observed that the privileges granted by Lee and Hemingway, placed the lessees under the demise from Hatfield, in a situation which rendered it more easy for them to obtain all the subsequent grants of coal which have constituted their profit for so many years, and which they would now keep to themselves, regardless, entirely, of the original agreement with Lee and Hemingway.

Therefore there must be a decree, in effect, for the plaintiff, as he asks it by his bill. I do not know that it is absolutely necessary that there should be a decree that the parties shall carry all the coal which they get from the other collieries, along the railway; because the object of the agreement will be sufficiently answered by having a decree that the defendants shall pay the two pence a ton for all coal that they get from those other collieries:

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and it struck me, upon the reconsideration of the case, that, in effect, what is stipulated by the articles of agreement (notwithstanding it is clogged with machinery about the mode of carrying the coal) is nothing more than saying this: "you shall have the right of making the railway on paying six guineas a year for every acre of land taken for that purpose, and a certain sum per ton upon the coal that you may get from the Hatfield colliery, or from any other collieries within the township of Stanley-cum-Wrenthorpe." That is the substance of the case.

[*244] *My opinion, therefore, is, that there must be a decree, in substance, for the plaintiff. As to the objection that was made, that the prayer asked that the defendants might execute a counterpart of a lease and so on, that is mere machinery; that has nothing to do with the substance of the case. Of course, I cannot order the defendants to take a lease if they do not like to do so. But I can make a decree which will insure to the plaintiff, that measure of justice which, in my opinion, he is entitled to both on the law and the equity of the case; and therefore the decree must be to the effect that the defendants are bound, by the agreement contained in the articles, to pay to the plaintiff the two pence per ton.

Declare that the defendants are bound, by the agreements, provisions and stipulations contained in the articles of agreement dated the 27th day of July, 1833, on the part of J. C. Harter and W. Harter, their executors, administrators and assigns: and declare that the plaintiff is entitled to be paid the tolls or wharfage dues in the said agreement mentioned, for or in respect of all coal raised, worked or gotten, by the defendants or any of them, for shipment or water sale, at or from the colliery in the said agreement mentioned, or in or from any other lands or grounds in the township of Stanley-cum-Wrenthorpe: Refer it to the master to take an account of all coals which, since the 31st day of December, 1839, have been raised, worked or gotten, by the said defendants or any of them, or by their or any of their order, &c., for shipment or water sale, at or from any of the collieries in the pleadings mentioned, situate within the said township, &c., &c.

1842.—Smyth v. Griffin.

*SMYTH v. GRIFFIN.

[*245]

*Jurisdiction.—Void Instrument.—Delivery up of Void Instrument.
Turpis Contractus.—Demurrer.*

1842: 7th December; and 1843: 12th January.

The plaintiff cohabited with M. S., a married woman; and, in consideration of her agreeing to continue to cohabit with him, he executed a deed, whereby, "for the consideration therein mentioned," he granted, to a trustee for her, an annuity, to commence on his death, marriage, or withdrawing his protection from her; and covenanted to charge any land that he should become possessed of, with the annuity; and, for further securing the annuity, he executed a bond, in the penalty of 1,000*l.*, to the trustee, and gave a warrant of attorney to enter up judgment against him on the bond; and judgment was entered up against him, at the suit of the trustee, for 1,000*l.* and costs. Some years afterwards, the plaintiff married; previously to which he had put an end to his intercourse with M. S.; and, having been advised that the annuity deed and collateral securities, which he stated to have been obtained from him for the consideration of future cohabitation, were not binding upon him, he refused to pay the annuity. In consequence of which, M. S., in the trustee's name, brought an action against him on the judgment. The bill prayed the annuity deed and collateral securities might be declared void, and be delivered up to be cancelled, and that the trustee might enter up satisfaction on the judgment, and that the action might be stayed. The trustee put in a general demurrer, which was allowed.

THE bill stated that, previously to 1832, the plaintiff, John Rowland Smyth, a captain in the 82d regiment of foot, being a very young man, was induced to take Maria Seller, one of the defendants, to live with him in unlawful cohabitation: that she was then a married woman; but had, previously to the plaintiff's acquaintance with her, separated from her husband, who, the plaintiff believed, was since dead: that, in 1832, and during such cohabitation, the plaintiff, being under the influence of Maria Seller, was prevailed upon, in consideration of her agreement to continue such cohabitation as long as the plaintiff should desire it, and as an inducement to her to do so, to execute an indenture of grant of certain annuities in trust for her and her daughter, Maria Smyth, another defendant: that the indenture was in the possession of Maria Seller, or of *Mr. Richards, [*246] her attorney in the action after mentioned; and the

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plaintiff had no copy and was unable to set forth the purport thereof, except so far as the same was stated in a memorial registered at the registry office in Dublin. The bill then set forth a copy of the memorial, from which it appeared that the deed was dated the 7th of December, 1832, and was made between the plaintiff of the first part, the defendant Griffin, of the second part, Maria Seller, of the third part, and Maria Smyth, who was described as the daughter of the plaintiff by Maria Seller, an infant, of the fourth part; and, thereby, the plaintiff, for the consideration therein mentioned, (a) granted to Griffin, his heirs, executors, &c., two annuities, one of 100*l.* and the other of 50*l.*, to hold the annuity of 100*l.* for the life of Maria Seller, and the same to be paid quarterly, on every 1st of January, &c., *the first payment to be made on whichever of those days should next happen after the death or marriage of the plaintiff, or next after he should have withdrawn his protection from Maria Seller*, whichever of those events should first happen; and to hold the annuity of 50*l.* for the life of Maria Smyth, and the same to be paid upon the same days as the annuity of 100*l.* was made payable, the first payment thereof to commence on whichever of the said days should first happen after the death or marriage of Maria Seller, or upon the cessation of the payment of the annuity of 100*l.*, in the event of her continuing to reside 12 months with her father, or in the event of her being again received under the protection of her husband, if living: and the deed contained a covenant, on the part of the plaintiff, *that, whenever he should become possessed of any sufficient landed property*, he would, at the request [*247] *of Griffin, his executors, &c., or at the request of Maria Seller or Maria Smyth, as the case might be, but at his own expense, *charge such lands with the annuities*, with powers of entry and distress. The bill further stated that the plaintiff was, also, at the time of the execution of the deed, and for the same consideration, prevailed upon to give his bond in the penalty of 1,000*l.*, to Griffin, and a warrant of attorney for entering up judgment, in one of the courts in Ireland, in an action on the bond, for further securing the payment of the annuities; and, on

(a) So in the bill.

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the 12th of December, 1832, judgment was entered up against the plaintiff at the suit of Griffin, in the Court of Exchequer in Ireland, for 1,000*l.* and costs. The bill then stated that the plaintiff, in pursuance of his arrangement with Maria Seller, continued unlawfully to cohabit with her for a considerable time after the execution of the annuity deed; but, in 1839, he married, and, some time before his marriage, put an end to his intercourse with her: that he had been advised and submitted that the annuity deed and collateral securities, which were obtained from him for the consideration or upon the understanding of future cohabitation, were not binding upon him; and, accordingly, he had lately refused to make any further payment under the same: that Maria Seller had lately brought an action against the plaintiff, in Griffin's name, in the Court of Exchequer at Westminster, upon the judgment in the Court of Exchequer in Ireland: that the plaintiff was advised that, *in consequence of the form of the action, and inasmuch as he could not produce the annuity deed, he could not safely plead to the action so as to raise the question of the invalidity of the deed and collateral securities*, for the judgment of a court of law: that Maria Seller and Maria Smyth pretended that the deed and *collateral securities were a good charge, [*248] in equity, upon the real estates which the plaintiff then had or might have, and threatened that they would, at some future time, take proceedings thereupon against the plaintiff's said estate: and the plaintiff charged that the deed and collateral securities were void in equity, and that he was entitled to be relieved against them, and to have the same delivered up to be cancelled, and to have the action stayed, and the judgment released or satisfaction thereof entered upon the records of the Court of Exchequer in Ireland: that no application had been made, to Griffin, to give his consent to the use of his name in the action; and that the same was brought without his knowledge or consent; and that he had been, for some years past, and still was in Canada.

The bill prayed that the annuity deed and collateral securities might be declared to be wholly void in equity; and that the same might be delivered up to be cancelled; and that Griffin might be decreed to release the plaintiff from the judgment, or to

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enter up satisfaction thereof upon the records of the Court of Exchequer in Ireland; and that the defendants might, in the meantime, be restrained from further prosecuting the action, and from commencing any other action, against the plaintiff, upon the annuity deed and collateral securities; or, if the court should be of opinion that the deed and collateral securities were not wholly void, that the same might be declared to be void so far as they affected to secure an annuity to Maria Seller; and that the plaintiff might be relieved against them to the extent of such annuity.

The defendant Griffin put in a general demurrer.

[*249] *Mr. *Bethell* and Mr. *Tripp* in support of it:—The excuse which the plaintiff alleges for bringing this matter into a court of equity, namely that he cannot safely plead to the action, in consequence of the form of it, and because he cannot produce the annuity deed, is wholly unfounded. He may crave *oyer* of the deed, or obtain an order for the production of it, from a judge at chambers; or he may subpoena Mr. Richards to produce it. (a) Therefore, if the annuity deed be invalid, its invalidity may be tried in the action. If the deed be valid, then, of course, the bill must fail: but, if it be invalid, then, if the invalidity appears upon the face of it, a bill cannot be filed to have it delivered up. *Simpson v. Lord Howden.* (b)

(a) The plaintiff had pleaded to the action, that, before and at the time of executing the warrant of attorney and annuity deed, Mrs. Seller was cohabiting with him in a state of concubinage, and that the judgment on which the action was brought, was recovered and entered up, by *nil dicit*, in pursuance of the warrant of attorney; and that that instrument was given as a security for the payment of a certain annuity, granted by an indenture, bearing date the 7th of December, 1832, and made between the defendant, &c.; (setting forth the names of the parties, and the contents of the deed, so far as they related to Mrs. Seller's annuity;) and that the warrant of attorney was given, and the annuity deed executed by him, in consideration of Mrs. Seller continuing so to cohabit with him, and for no other consideration or purpose whatsoever; and that the judgment was so entered up upon the warrant of attorney, for the purpose of securing and enforcing the payment of the annuity, and that the action was brought in respect of certain of the quarterly payments of the annuity being in arrear.

(b) 3 Mylne & Craig, 97.

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Supposing, however, that the invalidity of the deed does not appear upon the face of it; still the consideration *for it, and all the circumstances connected with it, may [*250] be brought before a court of law, and the court of law may decide as to its validity or invalidity. If that be so, the plaintiff has no right to seek relief in a court of equity.

We contend, however, that the deed is clearly valid. If a man makes a provision for a woman, in order to induce her either to commence or to continue an illicit intercourse with him, the provision is void. But, in the present case, the annuity was not to be payable until after the death or marriage of the plaintiff, or after he should have withdrawn his protection from Maria Seller; and, therefore, it not only did not operate as an inducement to her to continue her connection with the plaintiff; but it held out an inducement to her to terminate it. The case of *Gibson v. Dickie*,^(a) is almost identically the same as the present. There the plaintiff had cohabited with the defendant for a long time; and, during the continuance of the connection between them, the defendant agreed that, in case they should separate, he would allow the plaintiff an annuity of 30*l.*, for her life, provided she should continue single and not cohabit with any other man. The parties afterwards separated; and, the defendant having refused to pay the annuity, the plaintiff brought an action against him to recover the arrears. It was contended, for the defendant, that the allowance of the annuity in case of separation, was by way of inducement, to the plaintiff, to continue the illicit cohabitation. But the court held that, so far from its being an inducement to her to continue the cohabitation, it was rather an inducement to separate. The deed in this case, therefore, would have been unimpeachable, *if [*251] Maria Seller had been the sole object of it: but it derives additional validity from its providing also for the issue of the illicit connection between her and the plaintiff.

THE VICE-CHANCELLOR:—The action was brought on the

(a) 3 *Man. & Sel.* 462.

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judgment which was entered up, on the bond, in the Court of Exchequer in Ireland, in pursuance of the warrant of attorney.

Mr. *Tripp*:—The courts of law consider a judgment in a foreign court, to be only *prima facie* evidence of a debt: and a party who is sued upon it, is at liberty to plead the facts which tend to show the illegality of the consideration for it, in the same manner as he might have done if the action had been brought on the contract itself.

It has been the practice of this court, from the earliest period, to remain neuter, in all cases where the parties are *in pari delicto*. If, on the one hand, the court will not assist the woman to obtain the provision made for her by her partner in guilt, so, on the other hand, it will not assist the man to defeat the provision which he has made for the woman. *Batty v. Chester*,^(a) *Whaley v. Norton*,^(b) *Matthew v. Hanbury*,^(c) *Franco v. Bolton*.^(d)

Mr. *Stuart* and Mr. *Smythe* in support of the bill:—In cases like the present, courts of equity have concurrent jurisdiction with courts of law. Besides, the deed in this case, contains, not only a grant of the annuities *to Mrs. Seller and her daughter, but also an executory agreement, on the part of the plaintiff, to charge those annuities on any landed property that the plaintiff might thereafter become possessed of. Consequently the deed makes the plaintiff liable in equity as well as at law; and, therefore, a court of equity is the proper *forum* to relieve him from the provisions of the deed. In *Gray v. Mathias*^(e) the court refused to order a bond to be delivered up, because it was good for nothing on the face of it, and a piece of waste paper; but the executory agreement, to which we have referred, prevents the deed in this case, from being a piece of waste paper, and, of itself, entitles us to come to a court of equity for relief.

(a) 5 Beav. 103. See note at the end of the case.

(b) 1 Vern. 482.

(c) 2 Vern. 187.

(d) 3 Ves. 368.

(e) 5 Ves. 286; see 294.

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The bill asks that the deed and collateral securities may be declared to be void *in toto*; but, if the court shall be of opinion that the deed is not wholly void, then that it may be declared to be void, so far as it purports to secure an annuity to Mrs. Seller. Supposing, therefore, that the court should hold the deed and collateral securities to be good with respect to the annuity secured to the daughter, still, as the demurrer is to the whole bill, it must be overruled, if we are entitled to any part of the relief that it asks.

If the action in this case had been brought either on the annuity deed or on the bond, the plaintiff would have had a defence to it; for he might then have shown the illegality of the consideration. But, as the action is brought on the foreign judgment, and as a judgment is evidence of the debt, he has no means of defending himself at law. In *Franco v. Bolton*, the bill was filed after a verdict at law had been obtained upon the bond, *and the plaintiff might have defended himself at [*258] law; and, therefore, the demurrer was allowed. In *Gibson v. Dickie*, the provision was made in consequence of the parties being about to separate, owing to the differences that had arisen between them; and the defendant had received, from the plaintiff, 108*l.* bank stock and 100*l.* sterling. Besides, the provision was made upon the express condition that the defendant should, thereafter, live sole and chaste. That case, therefore, is plainly distinguishable from the present.

Mr. *Smythe* said that, though it did not appear from the bill what consideration was expressed in the deed, yet the bill alleged, and it was evident from the provisions in the deed as to the commencement of the annuity, that it was given as an inducement to Mrs. Seller, to continue to cohabit with the plaintiff: and, therefore, the illegality of the consideration sufficiently appeared upon the bill. He observed upon the circumstance of the bill being filed, not by Mrs. Seller herself, but by her trustee: and he relied on *Gray v. Mathias* as precisely in point; and

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referred to *Friend v. Harrison*, (a) *Guinness v. Carroll*, (b) *Don v. Lippman*, (c) *Ferguson v. Mahon*, (d) *Walker v. Perkins*, (e) and 1 *Storie* on Eq. 242.

Mr. *Bethell* replied.

THE VICE-CHANCELLOR:—Before I decide this case, I will read over Lord Langdale's judgment in *Batty v. Chester*; for I should be sorry to do anything inconsistent with His Lordship's decision in that case.

[*254] **January 12th.*—THE VICE-CHANCELLOR: (g)—It seems to me to be plain, upon what is stated in the bill, as to the contents of the annuity deed, the bond and warrant of attorney, that, upon the face of them, they were given for an unlawful purpose and would be held void at law, independently of the statement made by the plaintiff, as to what the consideration really was. The case, therefore, would, as to them, fall within the principle adopted by Lord Chancellor Cottenham in *Simpson v. Lord Howden*.

As to what is stated with respect to the foreign judgment, the plaintiff has not alleged, and I collect from what passed at the hearing, did not mean to allege that the judgment was entered up in pursuance of the warrant of attorney. Without more allegation than I find, I cannot assume that it was so entered up. If it was not so entered up, no ground for relief from that judgment is stated; and, therefore, none can be given.

The executory covenant to charge the plaintiff's future land, does not make the plaintiff's case better; as the whole instrument is void at law.

(a) 2 Carrington & Payne, 584.

(b) 1 Barn. & Adol. 459.

(c) 5 Cl. & Fin. 1.

(d) 11 Adol. & Ell. 179.

(e) 3 Burr. 1568.

(g) His Honor delivered a written judgment, of which the above is a copy.

1842.—Barned v. Laing.

If the true construction of what is stated in the bill, as to the deed, bond and warrant of attorney, were that upon the face of them, they were not given for an unlawful consideration, then the two decisions by Lord Langdale, in *Batty v. Chester*, (a) are exactly applicable *to this case, where the [*255] bill itself alleges the unlawful purpose; and I shall follow them: and, therefore, the demurrer must be allowed.

(a) There were two decisions by Lord Langdale, in *Batty v. Chester*, one on a demurrer to the original, and the other on a demurrer to the amended bill; but neither of them was reported when the demurrer in *Smyth v. Griffin* was argued. One of those decisions has been since reported. See 5 Beav. 103. But it does not seem to be an authority for the judgment reported above. That judgment, however, was affirmed by the Lord Chancellor, with costs, in *M. T.* 1844.

BARNED v. LAING.

Ne exeat Regno.—Practice.

1842: 8th December.

A writ of *ne exeat*, granted, though not prayed for by the bill.
Sharp v. Taylor, reported *ante*, Vol. XI, p. 50, observed upon.

MOTION to discharge for irregularity, a writ of *ne exeat regno*, which had been granted by the Vice-Chancellor on the 16th of February, 1841.

The original bill was filed in August, 1840. The defendant put in his answer, which the plaintiff excepted to for insufficiency. The exceptions were submitted to; and, on the 20th of January, 1841, the plaintiff obtained an order to amend and for the defendant to answer the amendments and exceptions at the same time. The amended bill was filed on the 9th of February, 1841; but no answer was put in to it when the writ was granted.

One of the affidavits on which the writ had been obtained, was made by the plaintiff, who deposed that, on the 27th of January, 1841, he first discovered and was informed, and he verily be-

 1842.—*Barned v. Laing*.

lieved that the defendant, Laing, was about to leave this country on a voyage to Sydney in Australia, as master of the ship *Hero*.

The other affidavit was made by a clerk to the plaintiff's [*256] solicitors, who deposed that, on the 12th of *February, 1841, he went on board the *Hero* in the London docks, and there saw the defendant, who informed him (and which information he believed to be true) that he, Laing, should sail for Sydney about the 25th of the month.

Mr. *Wakefield* and Mr. *Elderton*, in support of the motion to discharge the writ, said that the writ could not be regularly granted unless it was prayed for by the original bill or by a supplemental bill, stating the facts from which the intention of the defendant to leave the kingdom was to be inferred, if those facts had occurred subsequently to the filing of the original bill. *Sharp v. Taylor*.(a)

Mr. *Bethell* and Mr. *Chandless*, for the plaintiff, said that, in *Sharp v. Taylor*, it was stated, too generally, that the court could not grant the writ unless it was prayed for by the bill; besides, in that case, the plaintiff, when he filed his original bill, knew that the defendant intended to go abroad. They cited *Moore v. Hudson*,(b) Beames' Treatise on the Writ, p. 52, and the following passage from Lord Eldon's judgment in *Collinson v. —*:(c) "When this prerogative writ came to be applied as a civil process, it would have been an extraordinary exercise of jurisdiction to refuse it, merely as not prayed in a stage of the proceedings when there was no pretence for praying it. If, when the bill was filed, the defendant did not intend to leave the kingdom, it would have been highly improper to pray the writ. A groundless suggestion that the defendant means to abscond, [*257] would press too harshly, and *would also operate to create the very mischief which the court, permitting the motion without notice, means to prevent. The omission to pray the writ, therefore, forms no objection."

(a) *Ante*, Vol. XI, p. 50.

(c) 18 Ves. 353.

(b) *Madd. & Geld*. 218.

1842.—*Barnes v. Laing*.

THE VICE-CHANCELLOR :—In this case the amended bill was filed on the 9th of February ; but the plaintiff had no certain knowledge that the defendant intended to leave the kingdom, until the 12th of that month ; when Laing, himself, declared his intention to do so : and, therefore, when the writ was applied for, I thought it right to grant it.

If there had been in this case, as there was in *Sharp v. Taylor*, a series of facts leading to the knowledge of the defendant's intention to go abroad, all of which happened subsequently to the filing of the original bill and might have been stated by way of supplement, they ought to have been so stated. But as I found that, on the 27th of January, there had come to the knowledge of the plaintiff, not a state of facts by which he could have proved the defendant's intention to go abroad, but merely such information as induced him to believe that the defendant intended to do so, (and which belief, if it had been stated in a supplemental bill, without alleging sufficient grounds for it, would have gone for nothing,) and as I found that the plaintiff had no certain knowledge of the defendant's intention to leave the kingdom, until the 12th of February, which was after the amended bill was filed, it appeared to me that this was not such a case as fell within the set of circumstances alluded to in *Sharp v. Taylor*. And my opinion is that, according to the decisions of Lord Eldon and Sir John Leach in the cases cited, this writ ought not to be discharged ; and, *therefore, I shall refuse the motion. [*258] But as what I said in *Sharp v. Taylor*, is stated in a general way, and may have tended, in some measure, to mislead those who advised the motion, I shall refuse it without costs.

1842.—Whitfield v. Prickett.

EX PARTE ANGELL.

Practice.—Infant.—Guardian.—Maintenance.

1842: 9th December.

Order made, on petition without suit, for a reference to approve of a guardian and maintenance for an infant, having 150*l.* a year arising from land.

In this case the Vice-Chancellor made an order, on a petition without suit, referring it to the master to approve of a guardian and an allowance for the maintenance of an infant, who had a clear income of *one hundred and fifty pounds a year arising from land.*(a)

Mr. Torriano for the petitioner.

(a) See *In re Christie*, ante, Vol. IX, p. 643, and *Ex parte Mountford*, 15 Ves. 445. See also Seton on Decrees, 278 *et seq.*

[*259] *WHITFIELD v. PRICKETT.—EX PARTE BROOKES.

*Charging Order.—Debtor and Creditor.—Fund in Court.
Jurisdiction.*

1842: 9th December.

On a petition, by a judgment creditor of a party to a suit, who had obtained a charging order on a fund in court, to which the party was entitled, the court refused to order the fund to be paid to the petitioner, without the party's consent.

BROOKES having got a judgment for 400*l.* in an action in the Court of Queen's Bench against Whitfield, obtained an order from Lord Denman, C. J., under the act for abolishing arrest on mesne process (1st & 2d Vict. c. 110, sect. 14,(b) charging a fund

(b) The 14th section enacts, that if any person against whom any judgment shall have been entered up in any of her Majesty's superior courts at Westminster, shall have any government stock, funds or annuities, or any stock or shares of, or in any public company in England, (whether incorporated or not,) standing in his name in his own right, or in the name of any person in trust for him, it shall be lawful for a

 1842.—In re Wainwright.

in the Court of Chancery, to which Whitfield was entitled, with the amount of the judgment debt; and then presented a petition in the cause, stating as above, and praying that the fund, which amounted to 135*l*., might be paid to him, in part satisfaction of the debt. Whitfield had been served with the petition, *but did not appear*.

*The VICE-CHANCELLOR said that, without the con- [*260] sent of the party entitled to the fund, he could not make an order, on petition, for payment of it to the creditor: and that all that he could do, was to make a stop order in the usual terms.

Mr. *Bigg* appeared for the petitioner.

judge of one of the superior courts, on the application of any judgment creditor, to order that such stock, funds, annuities or shares, or such of them or such part thereof respectively, as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon, and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to, if such charge had been made in his favor by the judgment debtor; provided that no proceedings shall be taken to have the benefit of such charge, until after the expiration of six calendar months from the date of such order.

IN RE WAINWRIGHT.—EX PARTE SLADE.

Construction of 3 & 4 Will. IV, c. 74.—Fines and Recoveries.—Protector of Settlement.

1842: 9th December.

Where the tenant for life is a married woman, whose husband has been convicted of felony, the Court of Chancery is the protector of the settlement, though the life estate is not her separate property.

THE petition in this matter, reported *ante*, Vol. XI, page 352, was heard on this day, when the Vice-Chancellor refused the application. The Lord Chancellor, however, on a petition being presented to him by way of appeal, differed from his Honor, and granted the application.(a)

(a) See 1 Phillips' Rep. 258.

1842.—Walsh v. Gladstone.

*WALSH v. GLADSTONE.

[*261]

Revocation.—Legacy.—Will.—Construction.

1842: 16th December.

Testator drew two checks, on his banker, in favor of two of his servants, and delivered them to the servants, with directions to present them after his death. About a year afterwards, he made a testamentary instrument, by which, after giving legacies to different persons, and an annuity to each of the two servants, he bequeathed the residue of his personal estate to A. B., and revoked any former will or codicil by him made, and declared that instrument to be his last will. The three paper writings were admitted to probate, as constituting together the testator's last will. Hold that, though the Court of Chancery was bound to consider the amounts of the checks as legacies, they were revoked by the subsequent instrument.

C. R. BLUNDELL, Esq., the testator in the cause, some time before his death, delivered to his butler, William Hall, two sealed packets addressed to his bankers, with directions to retain them until after his death, and then to present them at the banking-house. On one of the packets was written: "to be delivered by William Hall;" on the other: "to be delivered by Ann Harris, of Ince." Shortly after the testator's death, the packets were delivered to the defendant, the executor, by William Hall, and were opened, in his presence, at the banking-house. One of the packets was found to contain a check in these terms:

"LIVERPOOL, Sept. 11th, 1833.

'Messrs. Arthur Heywood, Sons & Company, on demand, pay William Hall, of Ince, butler, of this place, 500*l*.

"CHARLES BLUNDELL."

In the other there was a similar check, in favor of Ann Harris, for 300*l*.

In November, 1834, the testator made a testamentary instrument, by which, after giving several legacies and annuities, and, amongst them, an annuity of 200*l*. a year to William Hall, and another of 60*l*. a year to Ann Harris, for their respective [*262] lives, he proceeded thus: * "and subject as aforesaid, and except as hereinafter mentioned, I give and be-

1842.—Walsh v. Gladstone.

queath *all the residue* and remainder of my personal estate and effects whatsoever and wheresoever, unto," &c., (naming his residuary legatees.) The only disposition contained in the subsequent part of the will, consisted of certain legacies to his executors on condition of their accepting the office. Then followed this clause: "and, lastly, *I do hereby revoke any former will or codicil* by me at any time made and declare this to be my last will and testament."

The Ecclesiastical Court admitted the last mentioned instrument and the two checks to probate: "as the last will and testament of the testator contained in the paper writings marked A., B. and C.," B. and C. being the checks—that is, it considered the instrument of November, 1834, and the two checks, as constituting together the testator's will.

On the hearing of a petition in the cause, presented by the residuary legatees, the question was, whether William Hall and Ann Harris were entitled to be paid the amount of the checks drawn in their favor respectively, in addition to the annuities, or whether they were entitled to the annuities only.

Mr. *Stuart* and Mr. *Fleming*, for the petitioners, said that the Ecclesiastical Court, by admitting the checks to probate, had decided nothing more than that they were of a testamentary nature; and that it was the province of the Court of Chancery to determine not only as to their construction or effect, but also whether any effect at all ought to be given to them: (a) that it had *been decided that effect could not be given to a [*263] check as a *donatio mortis causa*, nor could it take effect as a gift *inter vivos*; for it was merely an authority, to the banker on whom it was drawn, to pay the sum mentioned in it, and that authority was revoked by the death of the drawer; that it was impossible to read the paper writing marked A., without coming

(a) In *Gawler v. Standerwick*, (2 Cox, 15,) Sir Lloyd Kenyon, M. R., said that the codicil in that case, having been proved in the Spiritual Court, he was bound to receive it as a testamentary paper; but, having so done, this court was to construe it. The construction which his Honor put upon the codicil, was that it operated nothing.

1842.—Walsh v. Gladstone.

to the conclusion that the testator intended it to contain the final disposition of his property, and that the annuities mentioned in it were the only provision which the claimants were to have; and, therefore, the court must hold that those annuities were substitutional for the amounts of the checks. *Miller v. Miller*; (a) *Barclay v. Wainwright*; (b) *Campbell v. Lord Radnor*; (c) *Attorney-General v. Harley*; (d) *Fraser v. Byng*; (e) *Hemming v. Gurrey*; (g) *Duke of St. Albans v. Beauclerk*; (h) *Bryson v. Brownrigg*; (i) *Edwards v. Jones*; (k) *Ward v. Turner*; (l) *Tate v. Hilbert*; (m) *Jones v. Selby*; (n) *Cooté v. Boyd*. (o)

Mr. Roupell and Mr. Roll, for the respondents, said that, as the Ecclesiastical Court had admitted the checks to probate, the

Court of Chancery was bound to consider them, not as [*264] orders for the payment of money, but *as testamentary instruments bequeathing the sums mentioned in them, and as forming, together with the instrument of November, 1834, the last will of the testator: that the revocation clause in that instrument, could not be held to apply to the checks; because that clause, being a revocation of former wills and codicils, could not affect papers which had been decided, by the only competent tribunal, to be subsisting parts of the will. Besides, the Ecclesiastical Court never admitted, to probate, instruments that were wholly revoked; and, for that reason alone, the Court of Chancery was precluded from considering the checks as revoked.

They cited *Lawson v. Lawson*, (p) *Denny v. Barton*, (q) and *Methuen v. Methuen*. (r)

THE VICE-CHANCELLOR:—It appears to me that, whatever jurisdiction the Ecclesiastical Court may assume to itself, as to

(a) 3 P. W. 356.

(b) 3 Ves. 462.

(c) 1 Bro. C. C. 271.

(d) 4 Madd. 283.

(e) 1 Russ. & Myl. 90.

(g) 2 Sim. & Stu. 311.

(h) 2 Atk. 636.

(i) 9 Ves. 1.

(k) 1 Myl. & Cr. 226.

(l) 2 Vez. 431.

(m) 4 Bro. C. C. 286, & 2 Ves. jun. 111.

(n) Prec. Ch. 300.

(o) 2 Bro. C. C. 521.

(p) 1 P. W. 441.

(q) 2 Phillim. 575.

(r) Ibid. 416.

 1842.—Skipworth v. Westfield.

the construction of testamentary papers, anything it has done in the way of construction does not bind this court. For the purpose of admitting the papers B. and C. to probate, that court has, to a certain extent, taken on itself the jurisdiction of construction. But, when that court has admitted certain instruments as forming together the will, the question still arises, on the whole of them taken together, what is to be the construction of the will.

From the probate, it appears that the two papers B. and C. are put last. That I consider to be quite immaterial. They were dated in September, 1833; and I am bound, by the decision of the Ecclesiastical Court, to consider them as part of the will. Then I find that *there are the two papers dated [*265] in September, 1833, and a subsequent instrument, dated in November, 1834, which commences with declaring that it is the last will of the testator, and which proceeds to give annuities to William Hall and Ann Harris, without any reference to their having been before mentioned. Then there is a general residuary bequest, and, afterwards, an express revocation of all former wills and codicils. My opinion, therefore, sitting in a court of construction, is, that the bequests made by the papers B. and C., are revoked by the paper A.

Affirmed by the Lord Chancellor. See 1 Phillips' Rep. 294.

SKIPWORTH v. WESTFIELD.—WESTFIELD v. SKIPWORTH.

New Orders.—Bill of Discovery.—Costs.—Cross Bill.—Practice.

1842: 22d and 23d Decembe..

The discretion given to the court, by the 41st order of August, 1841, as to the costs of a cross bill of discovery, cannot be exercised before the hearing of the original suit, although the plaintiff in it dismisses his bill immediately after putting in his answer to the cross bill.(1)

(1) The Lord Chancellor on appeal, held that the defendant to the cross bill had
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THE bill in the second suit was a cross bill for discovery only, in aid of the defence to the first suit. Skipworth put in his answer to the cross bill and then dismissed his own bill.

Mr. *W. M. James*, for Westfield, now moved that Skipworth might be ordered to pay the costs of the cross suit. He said that the 41st order of August, 1841, directed that, where a defendant files a cross bill against the plaintiff, for discovery only, the costs of such bill and of the answer thereto, shall be, in the discretion of the court, at the hearing of the original cause; and that the plaintiff in the original suit ought not to be allowed, by dismissing his bill (which was his own act) to deprive the defendant of the benefit of the order: that the order ought to be [*266] *liberally construed, so as to make the remedy co-extensive with the mischief intended to be guarded against; and that the court ought to exercise the discretion given to it by the order, whenever the circumstances of the case required it to be exercised.

Mr. *Sidebottom* said that the court had no jurisdiction to alter the long established rule as to the costs of a discovery suit, further than it was altered by the new order.

THE VICE-CHANCELLOR:—If the new order had intended to give the court a discretion, generally, as to the costs of a cross bill of discovery, it would have concluded in these words: "at the hearing of the original cause, or otherwise." But, as it now stands, I am of opinion that the court cannot exercise any discretion as to the costs, except at the hearing of the original cause: and, therefore, I must refuse the motion, but without costs; as it is the first time that the question has arisen on the order.

a right to be paid his costs of the answer by the plaintiff, according to the old practice. 1 Phil. 277.

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*TEMPLEMAN v. WARRINGTON.

Will.—Construction.—Vesting and Divesting.

1842: 23d December.

Testatrix bequeathed the residue of her funded property, in trust for her niece for life, and, after her death, to be equally divided amongst all her children, whether sons or daughters, share and share alike; in case it should happen that there was but one child at the niece's death, then to go to that one only child; and in case of failure of issue, to go as the niece should appoint by her will. The niece had eleven children; three of whom died in her lifetime. Held that all the children took vested interest, and, as more than one survived their mother, there was no divesting of interests.

ELIZABETH PANTON made her will dated the 2d of July, 1804, and which was, partly, in the following words: "Having agreed with Hanmer Warrington, at the time of his marriage, to allow him 200*l.* a year, for the joint lives of him and his wife, till such time as 4,000*l.* was vested in stocks, for which Lieutenant-Colonel James Hay and David Pryce, Esq., were trustees, I therefore give and bequeath, to the said Lieutenant-Colonel James Hay and David Pryce, Esq., 4,000*l.* in trust to be vested in the funds for the joint lives of Hanmer and Jane Eliza Warrington, or the survivor of them, and, after their death, *to be equally divided among all their children, share and share alike.*" The testatrix then gave several pecuniary legacies, and appointed Peter Templeman, Esq., sole executor of her will, and then proceeded as follows: "And I hereby give and bequeath, to my said executor, Peter Templeman, Esq., all the money in the funds over which I have a disposing power, either South Sea stock, bank stock, annuities, or any other government securities, in trust for the following purposes, (that is to say,) first to pay all my just debts: and, all that remains afterwards, I give to the said Peter Templeman, Esq., upon trust for the following purposes, (that is to say,) upon trust(a) to Hanmer George Warrington, eldest son of Jane Eliza Warrington, 1,500*l.*, and to every other child of the said Jane Eliza Warrington, whether son or daughter, *that [*268] shall be living at the time of my decease, or born with-

(a) *See*.

 1842.—*Templeman v. Warrington*.

in one year after, 800*l.*: which money I desire my said executor to vest or place in the funds for the benefit of the said children, hereby empowering him to lay out any part he thinks proper for any of the children during their minority or for their education: all that remains after paying the above debts and legacies, I give to the said Peter Templeman, Esq., upon trust to pay the dividends, as they become due, to Jane Eliza Warrington, wife to Hanmer Warrington, for her sole and separate use, and not subject to the control, debts, or engagements of her present or any future husband, and her receipt alone to be a sufficient discharge to my executor for the same: I further will and desire that all my property in the funds which I have hereby given to my friend and cousin, Jane Eliza Warrington, for her life, may, *after her death, be equally divided amongst all her children, whether sons or daughters, share and share alike. In case it should happen that there is but one child at the time of the decease of the said Jane Eliza Warrington, then to go to that one only child: and, in case of failure of issue, to go as she, the said Jane Eliza Warrington, notwithstanding her coverture, shall, by her last will and testament, direct."*

The testatrix died in June, 1805, leaving Mr. and Mrs. Warrington her surviving. Mrs. Warrington had eleven children, four of whom were born before and were living at the testatrix's death; the others were born afterwards. Three of the children died in their mother's lifetime. The mother died in July, 1841.

The question was, whether the personal representatives of the three deceased children were entitled to share in the residue of the testatrix's stock, after payment of her *debts and legacies, equally with the surviving children; or whether the latter were entitled to the whole of the residue.

Mr. *Bethell*, Mr. *Schomberg* and Mr. *Bagshawe*, for the personal representatives of the deceased children:—It will be said, by the counsel for the surviving children, that the testatrix intended those children only who should survive Mrs. Warrington, to take the residue of her funded property. It is clear that *all* the children take vested interests under the trusts declared of the

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4,000*l.*: for, on the death of the survivor of Mr. and Mrs. Warrington, that sum is to be equally divided amongst all their children, share and share alike: and the trust of the residuary funded property in favor of the children, is expressed in the same words. The question then is whether, under the concluding words of the will, the interest of the children were liable to be divested on their dying in the lifetime of their mother. Now it is a well established rule of this court, not to give to a divesting clause, a more extensive meaning than it strictly bears; but, where it is to take effect on the happening of a particular contingency, to confine its operation to the happening of that contingency. In this case, the contingency contemplated by the testatrix, of there being only one child living at the mother's death, has not happened. And, therefore, the divesting which was to take place on the happening of that event and of that event only, has not taken place. It is a universal rule, in construing written instruments of every description, to adhere to what is expressed, and not to be wise beyond what is written. If the framer of an instrument has expressed a certain intention on the happening of a certain event, *it would be a [*270] violation both of common justice and of common sense to say that she had the same intention on the happening of a different event. *Smither v. Willock*(a) *Sturges v. Pearson*,(b) *Hulme v. Hulme*,(c) *Whittell v. Dudin*.(d)

Mr. *Bagshawe* relied on *Skey v. Barnes*.(e) He referred also to *Roebuck v. Dean*,(g) and *Browne v. Lord Kenyon*.(h)

Mr. *Wakefield* and Mr. *Weld* for the surviving children of Mrs. Warrington, said that there was no gift to the children, until the period of division, which was the death of their mother; and, therefore, none of them could take any interest in her lifetime.

Mr. *Mylne* and Mr. *Winterbottom* appeared for other parties.

(a) 9 Ves. 233.

(b) 4 Madd. 411

(c) *Ante*, Vol. IX, p. 644.

(d) 2 Jac. & Walk. 279.

(e) 3 Mer. 335.

(g) 2 Ves. jun. 266.

(h) 3 Madd. 410.

 1842.—Lord Braybrooke v. Meredith.

THE VICE-CHANCELLOR :—It is quite plain that all the children of Mr. and Mrs. Warrington, take vested interests in the 4,000*l.*, under the first clause in the will. The words of the last clause, are the same as the words of the first, down to “share and share alike :” and, therefore, in the first instance, vested interests are given to the children by that last clause. Then the rule is not to import into an instrument, more of contingency than is expressed in it; and as the event which the testatrix contemplated, namely, that there might be only one child living at the death of her niece, has not happened, I am of opinion [*271] that the vested interests which the children took, were not divested by their dying in the lifetime of their mother. The trust fund, therefore, must be divided into eleven parts, one of which must be transferred to the personal representatives of each of the deceased children, as well as to each of the surviving children.

The case of *Skey v. Barnes* is clearly in point.

LORD BRAYBROOKE v. MEREDITH.

Stamp.—Assignment.—Order for Payment of Money.

1842: 15th November. 1843: 12th January.

The interest of a sum, secured by a mortgage of tithes, being in arrear, the mortgagor wrote and gave, to the mortgagee, a letter to the lessee of the tithes, desiring him to pay the sum in arrear, to the mortgagee, and to charge it to the mortgagor, in settling for the tithes of the current year. The mortgagor sent the letter to the lessee, who undertook to pay the amount within a certain time. The payment, however, was never made. Held that the letter was not an assignment in equity, to the mortgagee, of a debt due from the lessee to the mortgagor, but was an order for payment of money, which could not be enforced, because it was not stamped.

In April, 1832, Lord Kensington, being seised in fee of lands in Middlesex and lessee, for certain lives, of the rectory of Llam-bister in Radnorshire, mortgaged the lands and rectory to the

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plaintiffs, to secure 60,000*l.* and interest; and Messrs. Heptinstall and Whittaker were appointed receivers of the rents of the mortgaged premises. Whittaker received the rents of the Middlesex estates; and thereout, paid the interest of the 60,000*l.*; but neither he nor Heptinstall acted as receiver of the Radnorshire estates. The defendant was in possession of those estates, as tenant to Lord Kensington, at the rent of 1,050*l.* under an agreement for a lease dated subsequently to the mortgage. The bill, however, represented that the agreement had been put an end to, and that the defendant was no longer in possession *of the rectory as tenant to Lord Kensington, but [*272] that he received the profits of it as his Lordship's agent or receiver.

In 1838, Lord Kensington made a further charge on the mortgaged premises, for securing a further sum which the plaintiffs had advanced to him: and the rents of the Middlesex estates having thereby, become insufficient to pay the interest of the sums secured, the plaintiffs obtained from Lord Kensington, a written order, requiring Meredith to pay 700*l.* to Messrs. Howe, Whittaker and Tatham, their solicitors. The order was dated the 20th November, 1838, and was as follows: "Please to remit to Messrs. Howe, Whittaker and Tatham, 700*l.*, and charge it in the account with me, in settling for the present year's tithes of the rectory of Llambister.—Yours, &c., KENSINGTON." Whittaker enclosed the order in a letter to Meredith, in which he gave the latter notice of the mortgage and further charge, and of the appointment of himself and Heptinstall to be receivers of the property, and added that if the order was complied with, they would not enter into the immediate receipt of the profits of the rectory. On the 1st of December, Meredith wrote in answer, that he was not then prepared, but would try to remit the 700*l.* in the course of nine days, when he hoped to be able to arrange matters to the satisfaction of all parties. He did not, however, make the remittance; but the plaintiffs, in consequence of his promise to do so, suffered him to remain in the receipt of the profits of the rectory; and he had received the same to the amount of 1,600*l.*

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The bill prayed for an account of all the sums received by Meredith, in respect of the rectory, since the 1st of December, *1838; and that the plaintiffs might be declared to be entitled to be paid the 700*l.* thereout.

Mr. *Bethell* and Mr. *Romilly*, for the plaintiffs, said that it was of no importance whether Meredith was tenant or receiver of the rectory; he was indebted to Lord Kensington to a greater amount than 700*l.*; and that Lord Kensington's letter, though unstamped, was valid as an assignment in equity of part of the debt. *Row v. Dawson*; (a) *Ex parte Alderson*; (b) *Lett v. Morris*; (c) *Ex parte South*; (d) *Tibbets v. George*. (e)

Mr. *Anderdon* and Mr. *James Parker*, for Meredith, said that Lord Kensington's letter was nothing more than an order for payment of money, and, as such, it ought to have been stamped, according to 55 Geo. III, c. 184: that Meredith's letter to Whittaker could not be construed into a promise to pay the 700*l.*; and, if it could, there was no consideration for the promise. *Emly v. Collins*; (e) *Butts v. Swann*; (g) *Firbank v. Bell*. (h)

Mr. *Freeling* appeared for Lord Kensington.

1843: *January 12th.*—THE VICE-CHANCELLOR:—It appears, from the pleadings, admissions and proofs, that in April, 1832, the plaintiffs became mortgagees in fee of Lord Kensington's freeholds of inheritance at Kensington, and mortgagees, for the lives of certain *cestui que vies*, of the rectory, glebe lands [*274] and *tithes of Llambister, in Radnorshire. The mortgagees were to secure 60,000*l.*, and Messrs. Heptinstall and Whittaker were appointed receivers both of the Kensington and Radnorshire estates. Whittaker acted, and was put in possession of the Kensington estates, as receiver. The receivers did not meddle with the Radnorshire estates; but Lord Kensington

(a) 1 Vez. 331.

(b) 1 Madd. 53.

(c) *Ande*, Vol. IV, p. 607.

(d) 5 Adol. & Ell. 107.

(e) 6 M. & S. 144.

(g) 2 Brod. & Bing. 78.

(h) 1 Barn. & Ald. 36.

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was allowed to remain in possession of them. The bill represents that, after April, 1836, Lord Kensington employed the defendant Meredith as his receiver of the Radnorshire estates, and that, on and before the 1st of December, 1838, a balance was due to Lord Kensington, from Meredith, in respect of his receipts. But though the bill so represents it, the passages read by the plaintiffs, from Meredith's answer, show that Meredith was not receiver, but was tenant of the Radnorshire estates; and, if he owed Lord Kensington anything, he owed it as rent. In April, 1838, further sums, amounting, altogether, to 14,277*l.* 6*s.* 2*d.*, were advanced, by the mortgagees, to Lord Kensington; and were secured by a further charge on the Kensington and Radnorshire estates. The rents and profits of the Kensington estates were not sufficient to keep down the interest of the increased mortgage money; there was a deficiency to the amount of 735*l.* yearly, or thereabouts: and, in November, 1838, there was due to the mortgagees for interest, up to the preceding 8th of October, 1,584*l.* 4*s.* 5*d.* Mr. Whittaker, with his partner or partners, was solicitor to the mortgagees, and, supposing that Meredith was receiver of the Radnorshire estates, sent him the letter of the 29th November, 1838, with Lord Kensington's order written on the fly leaf; which Meredith answered by his letter of the 1st of December; and the other letters in the admissions followed.

*If the order was a valid order, it would have bound [*275] Meredith to the extent of the money in his hands. But an objection is taken that it is void for want of a stamp.

The 55 Geo. III, c. 184, sched. 1, after imposing a stamp duty on inland bills of exchange, says all bills, drafts or orders for the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, if the same shall be made payable to the bearer or to order, or if the same shall be delivered to the payee, shall pay the same duty as on a bill on demand. The order seems, *prima facie*, within the words of the act; and, with respect to authorities, the case seems to me not distinguishable from *Emly v. Collins*. The court there

said:—"This is an order for the payment of money out of a particular fund, and does not stipulate for the doing of any collateral act. We should have been very glad to have been able to give it effect, if we could." In *Firbank v. Bell*, Lord Ellenborough said that it was the object of the Legislature, in framing this provision, to treat as promissory notes and bills of exchange and to subject to a stamp duty, such instruments as, being payable on a contingency or out of a particular fund, could not, in strictness, fall under that denomination. The same view was taken, in 1820, by the Court of Common Pleas, in *Butts v. Swann*. The certificate in *Jones v. Simpson*,^(a) in 1823, turned upon the 48 Geo. III, c. 149.

Now, the order in question was, in effect, an order to [*276] pay 700*l.* out of the money due to Lord Kensington, *in the hands of Meredith, for the ten year's tithes: and it seems to me to be within the act of 55 Geo. III, and therefore void for want of a stamp. Consequently Meredith was not bound by the order.

If he was not bound by the order, it is said that he was bound by his promise. To which it is answered, that, taking his letter of the 1st of December to be a promise, there was no consideration for it. And I rather think that is so; for what Mr. Whitaker held out was, that if Meredith would pay the money, he should not be turned out of the receivership. But, in fact, he was not in possession as receiver, but as tenant. Therefore, there was no consideration; and the plaintiff's bill cannot be sustained.

I do not think that there was much wisdom in filing the bill, and certainly there is no honesty in the defence. Therefore, I order the bill to be dismissed without costs.

(a) 2 Barn. & Cress. 318.

1843.—Perkins v. Deptford Pier Company.

*PERKINS AND OTHERS v. THE DEPTFORD PIER COM. [*277]
PANY.

Priority of Incumbrances.—Debenture Creditors.—Tolls (Mortgage of.)

1843: 14th January.

The Deptford Pier Company, under the powers of their act of Parliament, issued debentures, by which they mortgaged their tolls to persons who had lent them money for the purposes of their undertaking. Two creditors of the company, who held no security on the tolls, recovered judgments in actions against the company (which were undefended) for the debts due to him. Whereupon the debenture creditors filed a bill against them and the company, alleging that they themselves had the first charge on the lands of the company, and that the plaintiffs in the action colluded with the directors of the company, and intended to sue out *elegits* and to take possession of the lands of the company; and praying for an injunction to restrain them from so doing, and for a receiver of the tolls. A demurrer to the bill, for want of equity, was allowed.

By a local act of Parliament, (5 & 6 Will. IV, c. 13,) a company was incorporated for making and maintaining a pier and other works, at Deptford in Kent, and was empowered to raise 50,000*l.* for the purposes of the undertaking, by the sale of shares, and the further sum of 25,000*l.* to be secured by assignments by way of mortgage, in the form prescribed by the act, of the tolls, rates and duties to be raised under the act: but the mortgagees of the tolls, &c., were not to be preferred, one to another, on account of the priorities of their respective securities, or on any other account.

The plaintiffs were the persons to whom the company had made mortgages of the tolls in 1837 and 1839, in pursuance of the act. The defendants, Leeson and Prichard, were, severally, creditors of the company, in respect of the purchase moneys of *part* of the lands which the company had bought, in 1836, for the purposes of their undertaking, but were unable to pay for. Leeson, who was the vendor of part of those lands, had no legal security for the money due to him: but Prichard, who had advanced the amount of the purchase money for another part of those lands, had taken, from the company, a mortgage thereon for the amount.

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[*278] *The company afterwards became embarrassed in their affairs, and, being about to abandon their undertaking, and to sell their lands for payment of their debts, the bill was filed, charging that Leeson and Prichard, in collusion with the directors of the company, and with a view of unfairly prejudicing the claims of the plaintiffs as mortgagees of the tolls, &c., had entered into an agreement with the directors, securing to Leeson and Prichard, priority in the payment of the debts due to them, over the other debts of the company; and that, in pursuance of such collusion, they had brought actions against the company, for the sums due to them respectively; that the company did not defend the actions, and Leeson and Prichard obtained judgment therein, and intended to sue out *elegits* thereon, and, thereby, to obtain possession of the company's lands: that the plaintiffs accepted their debentures or mortgages of the tolls, upon the faith that the undertaking would be proceeded with, and that the moneys arising therefrom, would be applied in satisfaction of the principal and interest due to them: that the company ought not to abandon the undertaking, without making due provision for the payment of the moneys charged thereon: that the plaintiffs, by means of their securities, had the first charge on all the lands that had been conveyed to the company, and that the proceeds of the sale thereof ought to be applied, in the first instance, in payment of what was due to them. The bill prayed that the plaintiffs might be declared to be the first incumbrancers upon such of the lands *as had been conveyed to the company*, and to have an equitable lien, subject to Prichard's mortgage, on such of them as had been conveyed to Prichard; that the plaintiffs might be paid what was due to them on their securities; and that Leeson and Prichard might be restrained from suing out execution on their judgments; and for a receiver of the tolls.

[*279] *Prichard demurred to the bill, for want of equity, and on other grounds.

Mr. *Willcock*, in support of the demurrer for want of equity, said that the only right which a second incumbrancer had against the first, was to redeem him. and to get an assignment of his secu-

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rity; and that there was no instance of a second incumbrancer alleging the subsistence of a prior mortgage, and asking the court to prevent the mortgagee from availing himself of his legal title, and to put a receiver upon the estate: that, whenever a receiver was appointed, it was always without prejudice to the right of the prior mortgagee. *Whitworth v. Gaugain*.(a)

Mr. Wakefield and Mr. Twells, in support of the bill, said that the plaintiffs did not seek to interfere either with the lands comprised in Prichard's mortgage, or with the lands which Leeson had sold to the company; that it appeared, from the bill, that the company had other lands which had been conveyed to them, and that the plaintiffs sought to establish a lien on those lands only; that, though the plaintiffs were not entitled to those lands at law, yet they were entitled to the tolls, in priority to any other person; and, if the defendants got possession of the lands by virtue of their *elegits*, they would, in effect, take the tolls, on the security of which the plaintiffs had advanced their money; for, if the lands were taken, nothing would remain for the tolls to issue out of; that, by the terms of the debentures, the principal thereby secured was not payable until October, 1844, and that, in the meantime, the plaintiffs had no remedy at law for the interest. *Pontet v. The Basingstoke *Canal Company*;(b) [*280] *Doe v. The St. Helen's Railway Company*;(c) *Mellish v. Brooks*;(d) *Hodges v. Croydon Canal Company*.(e)

THE VICE-CHANCELLOR:—I do not understand how the plaintiffs have any sort of claim upon the property of the company, except that which they derive from the debentures.

The act of Parliament authorizes the company to raise money by mortgage in a given form; and the bill represents the debentures taken by the plaintiffs to be according to that form. The words of the act are: "That, in case the company shall be desirous of raising, by debentures, upon the credit of the undertaking,

(a) *Craig & Phill.* 325. Reported, on the hearing of the cause, 3 *Hare*, 416.

(b) 3 *Bing. N. C.* 433.

(d) 3 *Beav.* 22.

(c) 1 *Gale & Dav.* 602.

(e) *Ibid.* 86.

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a further sum, not exceeding 25,000*l.*, and shall make an order or enter into a resolution to that effect, at any general or special general meeting of the company to be called for that purpose, then that it shall be lawful for the directors of the company, pursuant to such order or resolution, to borrow or take up at interest any sum or sums of money not exceeding, in the whole, the sum of 25,000*l.*, or any part thereof, upon the credit of the undertaking, as to them shall seem meet and convenient; and the said directors are hereby, accordingly, fully authorized and empowered to assign over, by way of mortgage, to any person lending such money, the several tolls, rates and duties to be raised under or by virtue of this act, or any part thereof." But the act says nothing about raising money by mortgage of the lands.

Then the transaction with Prichard seems to be this. [*281] The company, being desirous to purchase some *lands, were not able to advance money to complete the contract, and, therefore, applied to Prichard to lend them the money: and then a conveyance was made to him, by way of mortgage, to secure the repayment of his advances, and, subject thereto, in trust for the company. Then it is stated that the company purchased other lands: but I do not understand that the plaintiffs thought it right to take any other security for the money they had lent to the company, than the security upon the tolls, rates and duties.

Then it is said that there was collusion between Leeson and Prichard, and the directors, which is exemplified by the fact that they brought two actions against the company (which they had a right to do) for the money lent by them to the company, and that they recovered judgments in the actions. I cannot comprehend why the court should interfere with that transaction, which is perfectly right and fair. Supposing that the directors and Leeson and Prichard had met together, and the former had said: "Your mortgages are not sufficient; you had better bring actions against the company, and recover judgment, and take out execution on any property of the company that you can make available:" there would have been no dishonesty in that. If the

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plaintiffs really meant to have security on the lands of the company, they might have had it. But they file a bill, because they have a lien on the tolls; and they say that there cannot be any tolls if there is no land; and these persons who first of all be-thought themselves of taking a mortgage on the land, may, by taking the land, prevent the raising of the tolls. But suppose that they do: they will be only using the powers which they lawfully may use.

*I think, therefore, that no equity, whatever, arises to [*282] the plaintiffs in that respect, and that they have no other right to the lands in mortgage or subject to the judgments of Leason and Prichard, than that which is to be inferred from the circuitous way in which they have taken security by debentures on the tolls. I shall therefore allow the demurrer on the general ground.

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Pleading.—Defendant.—Original Bill in the Nature of a Supplemental Bill.

1843: 17th and 18th January.

On the 5th December, 1839, an information relating to a free school, to which the master and usher were two of the defendants, was heard, but judgment was reserved. Shortly afterwards, the master and usher resigned, and a new master and usher were appointed. In November, 1840, judgment was pronounced, but the decree was not drawn up. In March following, an original information in the nature of a supplemental one, was filed against the new master and usher, praying the same relief against them as was prayed by the former information, and as the informant would have been entitled to against their predecessors. In May following, the minutes of the decree on the prior information were finally settled; and, under an order, to which the new master and usher were not parties, the decree was dated the 5th of December, 1839. In January, 1842, the new master and usher put in their answer, stating new matter, in order to show that the relief prayed by the information against them, ought not to be granted. Held, that they were at liberty so to do; and, consequently, that their answer was not impertinent.

IN December, 1837, an information relating to the Manchester free school, was filed, to which Dr. Elsdale and Dr. Richards, the

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then master and usher, were two of the defendants. The cause was heard before Lord Cottenham, C., on the 5th of December, 1839: but judgment was reserved. On the 25th of the same month, Dr. Elsdale resigned, and Dr. Richards was appointed master, and Mr. Germon, usher of the school. [*283] *In November, 1840, Lord Cottenham delivered his judgment, but the decree was not drawn up until the time after mentioned.

In March, 1841, the information mentioned in the title of this case, was filed, in order to bring before the court the new master and usher, together with Mr. Foster and two other gentlemen, who had been appointed trustees of the school, before the prior information was heard.

The information in the *Attorney-General v. Foster*, prayed the same relief against the defendants thereto as was prayed by the former information and as the informant would have been entitled to against their predecessors respectively.

In May, 1841, the minutes of the decree in pursuance of Lord Cottenham's judgment, were finally settled; and, by an order, to which none of the defendants in the *Attorney-General v. Foster* was a party, that decree was made to bear date the 5th of December, 1839. •

In January, 1842, the new master and usher put in a joint answer, stating, amongst other things, certain matters (some of which had been recently ascertained, and others had recently occurred,) in order to show that the prayer of the last mentioned information ought not to be granted. The answer was excepted to for impertinence; (a) and, the master having allowed the exceptions, the defendants excepted to his report.

[*284] . *Sir Charles Wetherell and Mr. Little in support of the exceptions:—The new master and usher were not bound

(a) The answer of the three new trustees, also, was excepted to on the same ground. The master overruled those exceptions; and exceptions to his report were overruled by Sir James Wigram, V. C. See 2 Hare, 81.

by the answer of their predecessors, but were at liberty to make a new and original defence to the information filed against them: for there was no privity between them and the former master and usher: they were appointed by the president of Corpus Christi College, Oxford, in whom the nomination of the master and usher is vested by the foundation deed made in the reign of Henry VIII. The information in this case, falls within the description of the bill mentioned by Lord Redesdale, (Treat. on Plead. p. 67, edit. 4th,) where that learned author says: "If, by any event, the whole interest of a defendant is entirely determined, and the same interest is become vested in another, by a title *not derived from the former party*, as in the case of succession to a bishopric or benefice, or of the determination of an estate tail, and the vesting of a subsequent remainder in possession, the benefit of the suit against the person becoming entitled by the event described, must be obtained by original bill in the nature of a supplemental bill; though, if the defendant whose interest has thus determined, is not the sole defendant, the new bill is supplemental as to the rest of the suit, and is so termed and considered." And at page 72, his Lordship says: "There seems to be this difference between an original bill in the nature of a bill of revivor and an original bill in the nature of a supplemental bill. Upon the first, the benefit of the former proceedings is absolutely obtained, so that the pleadings in the first cause, and the depositions of witnesses, if any have been taken, may be used in the same manner as if filed or taken in the second cause: and, if any decree has been made in the first cause, the *same decree shall be made in the second. [*285] But, in the other case, *a new defence may be made*; the pleadings and depositions cannot be used in the same manner as if filed or taken in the same cause; *and the decree*, if any has been obtained, *is no otherwise of advantage than as it may be an inducement to the court to make a similar decree.*" In page 98, there is this further statement with reference to the distinction between a bill of revivor and an original bill in the nature of a supplemental bill. "It has been also mentioned that if the interest of a plaintiff or defendant, suing or defending in his own right, wholly determines, and the same property becomes vested

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in another person *not claiming under him*, the suit cannot be supplied by a supplemental bill; but that, by an original bill in the nature of a supplemental bill, the benefit of the former proceedings may be obtained. A bill for this purpose must state the original bill, the proceedings upon it, the event which has determined the interest of the party by or against whom the former bill was exhibited, and the manner in which the property has vested in the person become entitled. It must then show the ground upon which the court ought to grant the benefit of the former suit to or against the person so become entitled; and pray the decree of the court adapted to the case of the plaintiff in the new bill. This bill, though partaking of the nature of a supplemental bill, is not an addition to the original bill, but another original bill, which, in its consequences, *may* draw to itself the advantage of the proceedings on the former bill." Those passages and the case of *Lloyd v. Johnes*(a) contain the doctrine which must guide the court in deciding upon the present exceptions.—[THE VICE-CHANCELLOR:—*Is the matter which is made the subject of exception, contained in the answer of the late master?—The matter of the first exception commences with Lord Cottenham's judgment in November, 1840: that, of course, could not be contained in the answer of the late master; nor could any part of the matter to which the second and third exceptions relate, be contained in that answer.(b)]

Mr. Bethell, Mr. Anderdon and Mr. Mylne in support of the report:—This information is wholly founded on the basis of the decree which now, on the records of this court, bears the date of the 5th of December, 1839: and the court must consider that decree as entirely binding.—[THE VICE-CHANCELLOR:—It will certainly bind those who were parties to the suit at the time when it was pronounced. As there was no privity between the

(a) 9 Ves. 37.

(b) The substance of the matter which was compromised in the exceptions to the answer of the three new trustees, is stated in 2 Hare, p. 87. The same matter was contained in the answer of Richards and Germon, and formed the subject of the exceptions to their answer.

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present master and usher and the late master and usher, so that the suit could not be continued by bill of revivor, the question is whether they have not a right to make a new defence to the decree.]—Lord Cottenham's judgment was pronounced in the presence of counsel for Elsdale, the then head master, and Richards, the then usher; they were represented at the hearing and took part in the argument against the information; how then can their successors contest the propriety of the decree? All persons who succeed to an office, are bound by a decree pronounced against their predecessors in that office. *No [*287] such person can say, so long as that decree remains unreversed, that it is not binding upon him. All that we ask by the present information, is to enforce, against the present master and usher, the decree that was made against the late master and usher. *Nanney v. Totty*,^(a) *Wagstaff v. Bryan*,^(b) *Devaynes v. Morris*,^(c) *Langley v. Fisher*.^(d)

At the conclusion of Mr. *Bethell's* argument, the Vice-Chancellor said: "Suppose that, after Lord Cottenham had made his decree, an act of Parliament had been passed which gave new rights to the master and usher, and they had ground to say that the law was so altered, by the act, that rights were given to them which the decree took away: and suppose that a bill of supplement was filed to carry the former decree into execution: it cannot, surely, be disputed that, under such circumstances, the master and usher would be at liberty to put in an answer and to insist on their construction of the act of Parliament."

At the conclusion of the argument in support of the report,

The VICE-CHANCELLOR, without hearing Sir C. *Wetherell* in reply, delivered judgment as follows:—My opinion is, upon the authority of Lord Eldon, in that passage in *Lloyd v. Johnes*,^(e) where he expresses an opinion as to the effect of a bill in the nature of a bill of supplement against a person who has

(a) 11 Price, 117.

(b) 1 Russ. & Myl. 28.

(c) 1 Myl. & Cr. 213.

(d) *Anis*, Vol. X, p. 345.

(e) 9 Ves. pp. 59 and 60.

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[*288] newly *come *in esse* as tenant in tail in remainder, that though, as he says, under some circumstances the former proceedings are to be taken both for and against that person, yet it is competent for him to make a new case.

I do not understand that the two defendants in this case come in by any sort of privity with their predecessors. As soon as they were appointed by the president of Corpus Christi College, they came into offices which were the same as their predecessors had held, but not by reason of any privity with their predecessors. It seems to me to be the same case as with regard to a bishop or a parson. If a decree were made in a cause in which a parson was a defendant, and then the decree being unexecuted, a change in the office takes place, and an original bill in the nature of a supplemental bill, is filed against the new incumbent, it appears to me that the very fact of filing the bill, admits that the defendant may make a defence.

All that these gentlemen, as I understand it, have done in their answer, is this: they state some circumstances which may or may not have the effect of showing that, though the decree in the original cause was right, which they do not dispute, yet that that decree ought not to be binding upon them: that is all. And I can conceive a great variety of circumstances which might tend to show that the decree in the original cause was clearly right, that is, was right with reference to the things alleged and proved in that cause; but when the original bill in the nature of a supplemental bill is filed against persons who come into the same office, but not by reason of any privity with the former holders of the office, and the question is, whether the decree shall be

[*289] prosecuted against them? they may show many *reasons why that decree should not be carried into effect against them.

And, if there is any portion of any one of these exceptions, which would at all have the effect of showing that the decree ought not to be carried into effect against the new master and the new under master, my opinion is that the exceptions must be allowed; because the master of the court has found, generally,

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that all the exceptions ought to be allowed. There has been no analysis made of the matter excepted to, in order to point out what might or what might not be taken as a reason why the decree should not be binding; and I do not apprehend that I am now to determine, whether or not what is alleged by way of defence, would or would not be a good defence at the hearing. But it is not alleged that some of these matters may not (but for the proposition of law which has been asserted) be such as would induce the court to say that the former decree, though right in the cause in which it was pronounced, should not be carried into effect as against these two defendants.

My own opinion is against the master's judgment, and therefore, I shall allow the exceptions.

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[*290]

*Next of Kin.—Nearest of Blood.—Civil and Canon Law.—Will.
Construction.*

1843: 18th, 25th and 26th January.

The master was directed to inquire who were the nearest in blood of a testator *ex parte paterna*, at a certain period. Held that "nearest of blood" and "next of kin" were synonymous terms, and, as the suit related to personal estate, that the master ought to follow the civil and not the canon law mode of computation in prosecuting the inquiry.

Testator bequeathed his residue to his wife for life, remainder to his daughter absolutely; but if his wife survived his daughter, then, at his wife's death, one-third of the capital was to go according to her will, and the other two-thirds were to go and be paid; "to my other the next of kin of my paternal line." The daughter was the testator's sole next of kin at his death; and exclusive of her, the testator's brothers were his next of kin at the same time. At the death of the widow, (who survived the daughter,) the daughter's children were the testator's next of kin, according to the statute, but they and the testator's brothers were his nearest of kin, all of them being his relations in the second degree. Held that the brothers, as well as the children, were entitled to two-thirds of the residue.

JOHN SPENCER, the grandfather of the plaintiffs, Fanny and Laura Cooper, made his will dated the 18th of January, 1806, and

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after bequeathing certain specific and pecuniary legacies, proceeded thus: "All the residue and rest of my effects whatsoever and wheresoever, I give and bequeath unto my executrix and executors in trust to pay and apply the annual produce thereof, to and for the use of my dear wife, and the maintenance of my daughter during her minority and during the life of my said wife; but, in case of the annual produce of such produce^(a) being 120*l.*, then in trust to pay and apply the sum of 20*l.* a year, to and for my said daughter when she shall arrive at the age of twenty-one years until the death of her said mother: in case she shall survive her said mother, my will and mind is that the whole of my said estate and property, shall go and be paid to my said daughter at the death of her said mother; and my will and [*291] mind further is that, in case *my said wife shall survive my said daughter, then my said trustees shall pay the whole of the annual produce of my said estate to my said wife, for and during the term of her natural life; and that, at her decease, a third part be paid and applied according to her last will and testament; and the other two-thirds, I will shall go and be paid to my other the next of kin of my paternal line."

The testator died possessed of personal estate only, leaving his wife and daughter, and three brothers and a sister, surviving. The daughter married in 1830, and died in 1834, leaving the plaintiffs her daughters and only issue. The widow died in 1838.

The bill was filed against the testator's surviving executors, the personal representatives of his daughter and widow, and one of his surviving brothers,^(b) praying that the rights and interests of all parties to and in his residuary estate, might be ascertained and declared.

By the decree at the hearing, the master was directed to inquire, first, who were the next of kin of the testator living at his death.

(a) *Sic.*

(b) The other surviving brother was out of the jurisdiction; and neither he nor the representatives of his deceased brother and sister were made parties to the suit.

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Secondly, who was or were the nearest in blood of the testator, *ex parte paterna*, living at his death.

Thirdly, who were his nearest of blood, *ex parte paterna*, living at the same period, exclusive of his daughter; and,

*Fourthly, who were his nearest of blood, *ex parte* [*292] *paterna*, living at the death of his widow.

The first inquiry was directed with reference to the one-third of the testator's residue which his widow had power to appoint by her will, and which, in consequence of her not having duly exercised the power, had become undisposed of. The rest of the inquiries had reference to the remaining two-thirds of the residue; and the words: "next of blood," were used instead of, "next of kin," in order to prevent the master from finding, as he otherwise would have done, who were the testator's next of kin according to the Statutes of Distribution.(a)

The third inquiry was directed because the testator had used the expression: "to my *other* the next of kin." The fourth was directed because one question was whether the testator's next of kin at his own death, or at the death of his widow, were entitled to the two-thirds of the residue.

The master found, first, that the daughter and widow of the testator were his next of kin at his death.

Secondly, that the daughter was the nearest of blood of the testator, *ex parte paterna*, at the same time.

Thirdly, that the testator's three brothers and his sisters were his nearest of blood, at the same time, exclusive of his daughter; and,

(a) See *Elmsley v. Young*, (2 Myl. & Keen, 780,) in which case the Lords Commissioners held that the words, "next of kin," when used *simpliciter*, meant, "nearest relations."

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[*293] *Fourthly, that the plaintiffs and two of the testator's brothers, who had survived the other brother and the sister, were the nearest of blood of the testator at the death of the widow.

The testator's brother, who was a defendant, excepted to the report, insisting :

First, that the master ought to have found that the daughter, and the exceptant and his brother and sister, were the nearest of blood of the testator, *ex parte paterna*, at his death :

Secondly, that the master ought not to have found that the plaintiffs were two of the testator's nearest of blood, *ex parte paterna*, at the death of his widow ; and

Thirdly, that the master ought to have found that the exceptant and his surviving brother were the only nearest of blood of the testator, *ex parte paterna*, at the death of the widow.

Mr. Wakefield and Mr. Faber in support of the exceptions:—The master has found that the two granddaughters are as nearly related, by blood, to the testator, as the brothers are ; that is, he has computed the degree of relationship according to the civil law. We submit, however, that, as he was directed to inquire, simply and without regard to property of any kind, who answered the description of nearest of blood to the testator, he ought to have computed the degree of relationship, not according to the civil, but according to the canon, that is the common law ; for the common law adopts the *mode of computation prescribed by the canon law ; and, according to that computation, the testator's brothers and sister were his nearest of blood at the death of his widow.

THE VICE-CHANCELLOR:—Even a daughter has less of the blood of her father than his brothers have ; because it has been diluted by the blood of her mother. I know, however, no case which has decided how proximity of blood shall be determined without reference to property.

Mr. *Cooper* and Mr. *Heathfield*, for the plaintiffs, in support of the report, contended that, as the inquiries were directed with a view to enable the court to decide as to who were entitled to property which was purely personal, the master had rightly adopted the mode of computation prescribed by the civil law; for it was laid down by Blackstone^(a) that, in questions relating to personal property, the nearest in degree to the intestate are to be preferred; and that that nearness or propinquity is to be reckoned according to the computation of the civilians and not of the canonists, which the law adopts in the descent of real estates; because, in the civil computation, the intestate, himself, is the *terminus a quo* the several degrees are numbered, and not the common ancestor, according to the rule of the canonists. Where the question is whether the daughter or the brothers and sisters of a person deceased, are entitled to his personal estate as his next of kin, the claim of the daughter is always preferred to the claim of the brothers and sisters; and, if the daughter is dead, her right devolves upon her children as representing her. *Gittings v. Macdermott*.^(b)

*Mr. *Calvert* for the personal representative of the [*295] daughter, supported the master's finding on the second inquiry.

Mr. *Wakefield*, in reply, said that the passage cited from Blackstone, related to the granting of letters of administration; and, therefore, had no bearing on the present case, where the question was, what was the meaning of certain words of description, having no reference to letters of administration or to property of any kind; and that the words, "of my paternal line," showed that the testator meant, not his own descendants, but the descendants of his father.

THE VICE-CHANCELLOR:—The question is, whom did the testator's mean? He clearly meant his own next of kin, with the qualification of their being of his paternal line. Therefore, the testator, himself, was the *propositus*: and, as the question is one

(a) 2 Comment. p. 504.

(b) 2 Myl. & Keen, 69.

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that relates, exclusively, to personal estate, the master was right in adopting the civil law mode of computation; and, therefore, the three exceptions must be overruled.

By the 31st Edw. III, the ordinary is bound "*deputer les plus prochains et plus loyals amis du mort intestat pur administrer ses biens.*" In *Hensloe's Case*, (a) Lord Coke, speaking of those words, says: "that is the next of blood."

The 21 Hen. VIII, c. 5, s. 3, says that the ordinary shall grant administration to the widow or to the next of kin: and [*296] Lord Coke, in the very next sentence in **Hensloe's Case* to that above mentioned, says: "the stat. of 21 Hen. VIII, c. 5, gives power to the ordinary to commit administration to the wife of the intestate or to the next of blood." I give the words in *Hensloe's Case*, as they stand in English. The words in my French copy of 9th reports, printed in 1697, which are translated "next of blood," are, in the first place, "*le plus prochain de sang,*" and, in the next, "*prochein de sang.*" Taking, as I do, Lord Coke's language to be the language of the law, the passages in *Hensloe's Case* show that, in the language of the law, the words next of kin and next of blood are synonymous.

The cause now came on to be heard for further directions.

Mr. Cooper and Mr. Heathfield for the plaintiffs:—The one-third of the testator's residuary estate, which was to be applied according to his widow's will, must go according to the Statute of Distributions; for, as she made no appointment of it, it has become undisposed of.

With respect to the remaining two-thirds of the residue, we submit that the next of kin of the testator *ex parte paterna*, at the death of his widow, and not at his own death, are entitled; and that they take to the exclusion of the testator's brothers and

(a) 9 Rep. 39 b.

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sister. The expression: "my *other* the next of kin," clearly excludes the daughter and the widow. Besides, the prior life interests given to the widow and daughter, makes this case an exception to the general rule that the period at which the next of kin are to be ascertained, is the time *of the tes- [*297] tator's death. *Briden v. Hewlett*,(a) *Jones v. Colbeck*,(b) *Miller v. Eaton*,(c) 2 Jarman on Wills,(d) *Holloway v. Holloway*.(e)

Next, the granddaughters take to the exclusion of the brothers and sister. In deciding as to the succession to personal estate, this court always follows the Statute of Distributions, except so far as its application is excluded by the words of the will. *Elmsley v. Young*.(g) Now, in this case, the next of kin of the testator who are to take, are his next of kin of his paternal line, and, therefore, the next of kin of his maternal line, are excluded; but, exclusive of them, his next of kin according to the statute are to take: and the statute prefers the lineal descendants of the deceased, however remote, to his collateral relations, however near. Consequently the plaintiffs in this case, being the grandchildren of the testator, are entitled to the two-thirds of his residue, exclusive of his brothers and sister.

Mr. *Heathfield* added that the words in the will: "at her decease," applied to the two-thirds of the residue as well as to the one-third; and that as the persons who were to take the one-third, that is the appointees under the will of the widow, could not be ascertained until her death, the persons who were to take the two-thirds, were to be ascertained at the same time.

Mr. *Lewis* for the personal representative of the widow, contended that she took an absolute interest in the one-third of the residue.—[THE VICE-CHANCELLOR:—It is [*298] not to be applied according to her disposal, but according to her will.]—Mr. *Lewis*.:—At all events, the widow's repre-

(a) 2 Myl. & Keen, 90.

(b) 8 Ves. 38.

(c) Coop. C. C. 272.

(d) Pages 54, 55 and 56.

(e) 5 Ves. 399.

(g) 2 Myl. & Keen, 780.

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sentative is entitled to one-third of the third, under the Statute of Distributions.

Mr. *Calvert* for the representative of the testator's daughter, said that the period at which the next of kin of the testator were to be ascertained, was his own death, at which time his daughter was his sole lineal descendant; *Jennings v. Newman*,^(a) *Holloway v. Holloway*, Sir John's Leach's observations on *Bird v. Wood*^(b) and *Briden v. Hewlett*.^(c) The decision in *Jones v. Colbeck*, turned on the peculiar language of the will and on the word "relations," being used in the plural number. In *Miller v. Eaton* Sir William Grant, M. R., decided against the next of kin at the testator's death, because they were expressly provided for by the will.—[THE VICE-CHANCELLOR:—In that case, the next of kin at the testator's death, were his *two* sons; and he directed that, in case both of them should die in the lifetime of his widow, his residue should go to and be divided between and among *all and every* his next of kin. The words, "all and every," necessarily meant more than two persons.]—The word, "other,"
 [*299] has been *relied on as showing that the testator intended to exclude his daughter; but it cannot have that effect: for the testator, in the paragraph in which he uses that word, mentions his wife only, and directs that, at her death, one-third of his residue shall go according to her will, and the other two-thirds to his *other* next of kin. Therefore, he clearly means his next of kin other than his wife.

THE VICE-CHANCELLOR:—It is perfectly plain that the testator did not intend his daughter to take the two-thirds of his resi-

(a) *Ante*, Vol. X, p. 219.

(b) 2 Sim. & Stu. 400.

(c) See 2 Myl. & Keen, 86. Sir John Leach there says, that the report of *Bird v. Wood* is too short, and that the circumstance that governed the decision in that case, though noticed in the statement, is omitted in the judgment.

But it is not easy to account for the omission, by the reporters, of an important circumstance in the judgment, which they mentioned in the statement, unless it was made by the learned judge who pronounced the judgment. Every judgment reported by S. & S. was not only copied from Sir John Leach's book of judgments, but was perused by him before it was sent to press.

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due. He gives the residue of his effects to his executrix and executors, in trust to pay and apply the annual produce thereof for the use of his wife and the maintenance of his daughter, during her minority and during the life of his wife; and, if the produce amounted to 120% a year, the daughter was to be paid 20% a year on her attaining twenty-one, until the death of her mother. Then the testator says: "In case she shall survive her said mother, my will and mind is that the whole of my said estate and property shall go and be paid to my said daughter at the death of her said mother: and my will and mind further is that, in case my said wife shall survive my said daughter, then my said trustees shall pay the whole of the annual produce of my said estate, to my said wife, for and during the term of her natural life, and that, at her decease, a third part be paid and applied according to her last will and testament, and the other two-thirds, I will shall go and be paid to my other the next of kin of my paternal line." Therefore it is plain, to demonstration, that the persons who were to take the two-thirds after the death of the mother, when the daughter should have predeceased her, were *his other next of kin of his paternal line, that [*300] is, his next of kin of his paternal line, exclusive of his daughter.

Mr. Wakefield and Mr. Faber for the defendant, the testator's brother, said that, as the court had decided that the representative of the daughter, was excluded from participating in the two-thirds of the residue, the only questions remaining to be argued were, whether the plaintiffs were entitled to share in the two-thirds with the brothers and sister of the testator, or whether the brothers and sister alone were entitled to the two-thirds; or, in other words, whether the persons entitled to the two-thirds, were those who answered the description of the testator's next of kin of his paternal line, at his death or at the death of his widow: that the general rule was that, where a gift is made by a testator to his next of kin, (even after a life interest to his sole next of kin,) the period at which the next of kin are to be ascertained, is the testator's death; that that rule ought to be followed in the present case; for, not only was there no ground for departing

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from it, but there was a reason for adhering to it; inasmuch as the words of gift used by the testator, were in the present tense, although the period of distribution was future.—[THE VICE-CHANCELLOR:—Do you imagine that the persons who were to take the two-thirds were to be ascertained at a period different from that at which the persons who were to take the one-third, were to be ascertained?—If the period at which the parties entitled to the two-thirds are to be ascertained, is the death of the widow, then our client and his brother are entitled to participate, in the two-thirds, equally with the plaintiffs.

[*301] *Mr. Cooper, in reply, said that the persons who were to take the two-thirds of the residue, and the persons who were to take the one-third, were all to be ascertained at the same time; and, as the latter could not be ascertained until the widow's death, the former must be ascertained at that time: that the plaintiffs were exclusively entitled to the two-thirds, notwithstanding the brothers stood in the same degree of relationship to the testator, as *they* did; for the succession to personal estate was not always regulated by the degree of relationship: that the father and the child of a person deceased, were each of them related to the deceased in the first degree, but the child was preferred to the father: that a grandchild and a brother stood in the second degree of relationship to the deceased, but the grandchild took to the exclusion of the brother; and that in this, as in every other case where property was either bequeathed to or devolved upon next of kin, the court, in deciding as to the rights of the different claimants, must follow the Statute of Distributions, except so far as the application of it might happen to be excluded by the express provisions of the will; and, as there was no exclusion of the statute, in this case, except with regard to the next of kin *ex parte materna*, the court must decide that the plaintiffs were alone entitled to the two-thirds of the residue, they being the sole next of kin, *ex parte paterna*, according to the statute.

THE VICE-CHANCELLOR:—Supposing it to be reasonably clear, on the face of the will, that the testator meant that, if the

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daughter died in the lifetime of her mother, the persons who answered the description of his next of kin of his paternal line, should be ascertained at the death of the mother, then this question arises: whether all the persons who, at that time, *were the next of kin *de facto*, must not take, notwithstanding two of them were grandchildren, and the rest were brothers of the testator. [*302]

Now the principle of the decision in *Elmsley v. Young*, was that the court must consider the words, "next of kin," as describing the persons who are to take; that is, it must not look at the Statute of Distributions in order to ascertain who those persons are, but must inquire who are the next of kin, irrespective of the statute.

If then I adhere to the decision in *Elmsley v. Young*, which I think is right, I have only to consider who are the persons that come within the descriptive words.

The master has found that the testator's three brothers and his sister, were his next of kin at his death, exclusive of his daughter, (whose claim I have already disposed of,) and that his two grandchildren, and his two surviving brothers, were his next of kin at the death of his widow. Then the next question is, at what time are the persons answering the description of next of kin to be ascertained?

The testator has given the whole of his residue to his daughter, after his wife's death; but, if his wife should survive his daughter, he has directed the whole of the produce to be paid to his wife for her life, and, at her death, that a third part of the capital shall go according to her will, and the other two-thirds, to his next of kin of his paternal line. The words, therefore, show that all the persons to take at the death of the widow, were to be simultaneously ascertained; and, therefore, I think that the persons entitled to the two-thirds of the residue, are the two grandchildren and the two surviving brothers of the testator.

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[*303] *Let the exceptions taken by the defendant William Spencer, (the testator's brother,) to the master's report, bearing date, &c., be overruled, &c., &c., and declare that subject to the life interest therein, by his will, bequeathed to his wife, and to the sum of 20*l.* a year, thereby bequeathed to his daughter, in the events which happened, the testator died intestate as to one-third part of the residue of his personal estate and effects, and that upon his death, subject as aforesaid, such equal one-third part became vested, as to one-third part thereof, in the testator's widow, and, as to the remaining two-third parts thereof, in his daughter, as his next of kin; and declare that, upon the decease of the widow, the remaining two third parts of the residue became vested in the plaintiffs and the defendant William Spencer and Joseph Spencer, (the testator's other surviving brother,) in equal shares, as the nearest of kin of the said testator of his paternal line then living.

[*304]

*LEACH v. LEACH.

Parent and Child.—Maintenance.—Account.—Will.—Construction.

1843: 18th and 19th January.

Testator gave an annuity to a trustee, in trust to pay the same to his daughter for her separate use for life, remainder to her husband to enable him to maintain his children by her, until the youngest attained twenty-one; and, if the husband should die before the youngest child attained twenty-one, then upon trust for the trustee to apply the annuity in like manner as the husband was directed to do. Held, (the daughter being dead,) that the husband was bound to apply the annuity for the maintenance of the children; but that, if he maintained them properly, they would not be entitled to an account against him.

JOHN OKINES bequeathed certain leasehold houses, to his son, John Okines, in trust to pay an annuity of 200*l.*, out of the rents to the testator's daughter, Elizabeth Ann, the wife of the defendant, Thomas Leach, for her separate use for her life, and after her death, to Thomas Leach, *to enable him to maintain and educate all and every the child and children of the said Elizabeth Ann*

Leach, and for their advancement in life, until the youngest of them should attain twenty-one; and, in case Thomas Leach should die before the younger of such children should attain twenty-one, then *upon trust for John Okines to apply the same in like manner as Thomas Leach was thereby directed to do*: and, when the youngest of such children should have attained twenty-one, then upon trust to sell the houses, and, after paying the expenses of the sale, to divide the surplus among all and every such child and children as should be then living, share and share alike.

The testator died in 1824. His son duly paid the annuity to his daughter, until February, 1884, when she died leaving seven children.

The bill was filed by three of the children, one of whom was of age, and the two other infants, against their father and their brothers and sisters, and against John Okines, the son, alleging that since their mother's death, their father had married again, and had treated his *children by his former wife [*305] with unkindness and neglect, and had applied a very small part only of the annuity for their maintenance or advancement in life, but had applied by far the greater part thereof to his own use. The bill prayed for an account of the sums received by Leach in respect of the annuity and of his application thereof; and that he might pay into court such part thereof as had not been properly applied by him; and that the rights and interests of the children, in the annuity, might be declared; and that their father might be restrained from receiving the annuity, and John Okines from paying it to him; that a guardian might be appointed of the infant plaintiffs, and a proper allowance be made for their maintenance.

The father said in his answer, that he had regularly received the annuity since his first wife's death, but, that being entitled, as he had been advised, *to receive it for his own use and benefit*, until the youngest child should attain twenty-one, he had not applied any part of it for the maintenance or advancement in life

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of the children, but, as he submitted he was entitled to do, had mixed the whole of it with his own moneys and income, and applied the same to his own use: but, nevertheless, he had at a considerable expense, maintained, educated, clothed, brought up and advanced the children out of his own moneys.

Mr. *Bethell* and Mr. *Elderton* for the plaintiffs, contended that *Leach* was a trustee of the annuity for his children, and that he had no interest in or power over it, except for the purpose of distributing it amongst his children; and that the trust for the separate use of his wife, and the whole frame of the will, [*806] showed that he was not intended to have any *beneficial interest in the annuity, but that the testator's sole object was to supply him with the means of fulfilling the obligations of a father to his children. They relied principally, upon *Wetherell v. Wilson*.(a) They cited also *Jubber v. Jubber*;(b) *Woods v. Woods*;(c) *Rippon v. Norton*;(d) and *Page v. Way*;(e)

Mr. *Teed* and Mr. *Speed* for Thomas *Leach*:—All the charges in the bill, as to the father having neglected his children, are denied by the answer.(g)

There is no instance in which the court has decreed a father to account to his children, for his past receipts of a fund given for their maintenance. If the testator intended the father to be a trustee of the annuity for the children, why did he direct his son to pay it to the father? Why did he not direct his son to apply it for their maintenance? Where a fund for the maintenance of children, is given to a stranger who is under no legal obligation to maintain them, the court will declare that he is a trustee for the children; but, where the fund is given to the father for that purpose, the children are not entitled to such a declaration. Here the fund is first given to John *Okines* in trust to pay it to the father; therefore, *Okines* and not the father

(a) 1 Keen, 80.

(b) *Ante*, Vol. IX, p. 503.

(c) 1 Myl. & Cr. 401.

(d) 2 Beav. 63.

(e) 3 Beav. 20.

(g) There is no evidence in the cause.

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is the trustee of it. In *Benson v. Whittam*, (a) your Honor says: "I am not aware that there is any case, where there is a gift to a party, apparently in terms which would make him the taker, so as to have a *benefit, and words have been [*307] connected with it, which express the reason for which it was given, such as these: "to enable him to assist such of the children of my deceased brother, Francis Benson, as he, the said Arthur Benson, shall find deserving of encouragement," in which the court has held that a trust was created for those persons. The cases that have been cited, are cases where property has been given to a legatee, with power to select one or more of a specified class of persons to take the property after the decease of the legatee." *Berkley v. Swinburne*; (b) *Hadow v. Hadow*; (c) *Gilbert v. Bennett*; (d) *Hammond v. Neame*; (e) *Andrews v. Partington*. (g) In this last case, the Lord Chancellor says: "If the will had given the dividends to the father for the maintenance of the children, it would have amounted to a legacy of the dividends to the father, which he would have been entitled to, though he had not spent half of it in the children's maintenance. I know of no middle case."

Mr. R. Perry and Mr. Hood appeared for the other defendants.

THE VICE-CHANCELLOR:—The necessary construction of the words of the will, is that the testator did not intend the father to take the annuity to himself, altogether and exclusively of any consideration as to the maintenance, education and advancement in life of his children. The testator has put a clear interpretation on his own words. And, if there was any doubt on the former part of the sentence, the *testator has removed [*308] it by a clear expression of his intention in the latter part, where he states what is to be done with the fund after the death of the father. He says: "In case the said Thomas Leach shall die before the younger of such children shall attain the said age of twenty-one years, then upon trust for the said John Okines,

(a) *Ands*, Vol. V, p. 30.(b) *Ands*, Vol. VI, p. 613.(c) *Ands*, Vol. IX, p. 438.(d) *Ands*, Vol. X, p. 371.

(e) 1 Swans. 35.

(g) 2 Cox, 223.

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his executors or administrators, to apply the same as the said Thomas Leach is hereby directed to do." By those words he has put an interpretation on the language of the prior declaration.

I admit that, so long as the father properly maintains his children, they are not entitled to call upon him for an account: but it must appear, to the court, that he has properly maintained them.

Declare that the defendant T. Leach, the husband of Elizabeth Ann Leach, is bound to apply *the annual sum of 200*l.* in the pleadings mentioned*, in the maintenance and education of all and every the said children of the said Elizabeth Ann Leach, and for their advancement in life, until the said youngest of the children shall attain the age of twenty-one years: Refer it to the master, to inquire and state whether the said T. Leach has applied *the same* in the maintenance, education and advancement in life of all and every the said children, with liberty to state special circumstances: Order the defendant John Okines, the trustee of the said annuity, to pay to the said defendant Thomas Leach, the sum of 200*l.*, being the amount of the arrears of the said annuity now due from him to the said defendant T. Leach, up to the 25th of December, 1842, and all future payments of the said annuity, as they accrue due, for the purposes aforesaid: And for the better discovery of the matters aforesaid, the parties are to produce, before [*309] the *said master, on oath, all books, &c., and to be examined on interrogatories, and reserve further directions and costs; and any of the parties are to be at liberty to apply, &c.

ELLISON v. ELWIN.—ELWIN v. WILLIAMS.—SAME v. HURLOCK.

Husband and Wife.—Chose in Action.

1843: 23d and 24th January; and 1st April.

By articles entered into on the marriage of a female infant, she and her intended husband agreed to assign, on her attaining twenty-one, a share of her deceased

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grandfather's residuary estate to which she was entitled under the trusts of his will, to trustees, in trust for themselves and their children; and, after the lady had attained twenty-one, a settlement was made in pursuance of the articles; but before the settled property was transferred to the trustees, the husband died. Held that the wife's right to the property by survivorship, was not barred.

UNDER the will of F. Potter, who died in 1799, one moiety of his residuary personal estate, consisting of stock in the funds, &c., was vested in trustees, in trust for his daughter Sarah, the wife of Robert Ellison, for her separate use, for her life, and, after her death, in trust for Sarah, her daughter, absolutely, but subject to the payment of one-half of the income, to Robert Ellison for his life, if he survives his wife.

In October, 1812, an indenture (being articles of agreement in contemplation of the marriage of Sarah, the daughter, *then an infant of the age of nineteen*, with Ralph Nicholson) was made between Nicholson of the first part, Ellison and wife of the second part, Sarah, the daughter, of the third part, and certain trustees of the fourth part, whereby it was agreed between the parties and Sarah, the daughter, for herself, her heirs, &c., and Nicholson, for himself, his heirs, &c., and for his intended wife, covenanted with the trustees, that in case *the marriage should [*310] take effect, they would, as soon as conveniently might be after Sarah should attain twenty-one, or die under that age, assign the before mentioned moiety of the testator's residuary estate to the trustees, in trust for Nicholson and his intended wife, for their lives, successively, and, after their deaths, in trust for their children.

The marriage was solemnized shortly after the date of the articles, and Mrs. Nicholson attained twenty-one in August, 1815. In March, 1821, her mother died; and in June, 1822, her father married Mary Ann Ellison, the plaintiff in *Ellison v. Elwin*. In March, 1823, a settlement was made, for the purpose of carrying the articles into effect, to which Mr. and Mrs. Nicholson and the trustees were the only parties. In September, 1838, Mr. Nicholson died, leaving his wife and nine children by her surviving. In July, 1839, Mr. Ellison died, and Mary Ann Ellison became

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his personal representative, and also the personal representative of his first wife.

At Mr. Ellison's death, the stock in the funds, which formed part of the testator's residuary estate, remained standing in the names of the trustees of the will.

The marriage articles and settlement comprised not only the before mentioned moiety of the testator's residuary estate, but also the other moiety thereof, in which Mrs. Nicholson had a contingent reversionary interest under her father's will: and the bill in *Ellison v. Elwin*, was filed against the trustees of the settlement and Mrs. Nicholson and her children, praying that the settlement might be rectified according to what the bill alleged to have been the real intention of the parties, with regard to that other [*311] moiety; and that, under the circumstances *stated, the plaintiff, as the representative of Mr. and Mrs. Ellison, might be declared to be entitled to one-half of that moiety.

The bill in *Elwin v. Williams* was filed by the trustees of the settlement, against the trustees of the testator's will, and Mrs. Nicholson and her children, and certain other persons, stating that Mrs. Nicholson alleged that, *as she was an infant when the articles on her marriage were executed, she was not bound thereby*, and that she was entitled to have a moiety of the stock which had formed part of the testator's residue, transferred to her; and stating also that Mrs. Nicholson's children made claims adverse to their mother; and praying that the rights and interests of the plaintiffs, as the trustees of the articles, and of the several defendants, to and in the property in question, might be ascertained and declared by the court.

The bill in *Elwin v. Hurlock* was supplemental to *Elwin v. Williams*.

Mr. Bethell and Mr. Hardy, appeared for Mary Ann Ellison, the plaintiff in *Ellison v. Elwin*: but the most important question arose, in *Elwin v. Williams* between Mrs. Nicholson and her chil-

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dren. Mr. *Stuart* and Mr. *Younge* appeared for the plaintiffs in that suit, the trustees of Mrs. Nicholson's marriage articles and settlement.

Mr. *Teed* and Mr. *Rogers*, for Mrs. Nicholson, contended that she was not bound by the articles executed on her marriage, because she was then an infant; *Simson v. Jones*;(a) and, though she was of age when *the settlement was made, [*812] and her interest in half of her moiety of the testator's stock had become, by her mother's death, an interest in possession, her interest in the other half was expectant on her father's death; and the assignment made by the settlement (being, in fact, the act of her husband alone) could not affect her right, by survivorship, to her *chose in action*, even if her interest had been wholly in possession.

Mr. *Anderdon* and Mr. *Spurrier* for some of Mrs. Nicholson's children who were infants, said that, before *Hornsby v. Lee*(b) and *Purdew v. Jackson*(c) were decided by Sir Thomas Plumer, it had been the opinion of the profession that there was no difference as to the effect of an assignment by a husband, of his wife's *chose in action*, for valuable consideration, whether the interest of the wife was in possession or in reversion: that in consequence of the decisions in those cases, it was now too late to contend that the husband's assignment, though for valuable consideration, would pass a *chose in action* in which his wife had merely a reversionary interest; but Sir Thomas Plumer did not decide and did not intend to decide anything except as to a reversionary interest: that the Lord Chancellor's decision in *Honner v. Morton*(d) proceeded precisely on the same ground; and the commencement of the judgment showed that his Lordship did not mean to carry Sir Thomas Plumer's doctrine one step further: "This fund was a *chose in action* of the wife; it was her reversionary *chose in action*. Whether the husband has the power of assigning his wife's re-

(a) 2 Russ. & Myl. 365; see Judgment, 375. See also, *Hastings v. Orde*, ante, Vol. XI, p. 205; and *Ashton v. Macdougall*, 5 Beav. 56.

(b) 2 Madd. 16.

(d) 3 Russ. 65.

(c) 1 Russ. 1.

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versionary interest in a *chose in action*, is a question [*313] which has been repeatedly *agitated, and has excited considerable interest both at law and in equity. At law the *choses in action* of the wife belong to the husband, if he reduces them into possession; if he does not reduce them into possession, and dies before his wife, they survive to her. When the husband assigns the *chose in action* of his wife, one would suppose, on the first impression, that the assignee would not be in a better situation than the assignor; and that he, too, must take some steps to reduce the subject into possession, in order to make his title good against the wife surviving. But equity considers the assignment by the husband as amounting to an agreement that he will reduce the property into possession; it likewise considers what a party agrees to do as actually done: and, therefore, where the husband has the power of reducing the property into possession, his assignment of the *chose in action* of the wife will be regarded as a reduction of it into possession. On the other hand, I should also infer that, where the husband has not the power of reducing the *chose in action* into possession, his assignment does not transfer the property, till, by subsequent events, he comes into the situation of being able to reduce the property into possession; and then his previous assignment will operate on his actual situation, and the property will be transferred:" that that passage showed that the Lord Chancellor did not mean to extend the doctrine to cases where the *chose in action* either was capable of being reduced into possession at the time of the assignment, or became so during the coverture; *Salisbury v. Newton*,^(a) and *Garforth v. Bradley*,^(b) where Lord Hardwicke, adverting, towards the conclusion of his judgment, to the case of the wife surviving, says that an assignment, by her [*314] husband, of *her *chose in action*, for valuable consideration, would be good against the wife: *Bush v. Dalway*,^(c) 2 Roper on Husband and Wife.^(d) In *Johnson v. Johnson*^(e) Sir T. Plumer, M. R., concedes the point which we are now contending for. He says: "The next question is, what is

(a) 1 Eden, 370.

(d) Jacob's edit. p. 27.

(b) 2 Vez. 675; see 678.

(e) 1 Jac. & Walk. 476.

(c) 1 Vez. 19; & C., 3 Atk. 530.

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the effect of the assignment upon this fund, which was in court and belonged to a married woman? The doctrine on this subject stands on the peculiar principles of the court. If it were now a new point, it would be difficult to understand how the assignee could be in a better situation than the husband himself; for the assignment does not reduce it into possession; it still remains a *chose in action*; and its being a *chose in action*, gives the wife a right by survivorship. But it is too late to consider this: for it is decided that an assignment for valuable consideration, being a disposition of the property, is sufficient to bar the right of the wife surviving. *Lord Carteret v. Paschal*."(*a*)

Mr. *Cripps* appeared for the adult children of Mrs. Nicholson, but took no part in the argument.

Mr. *K. Parker*, Mr. *Stinton*, Mr. *Paynter*, Mr. *Humphry* and Mr. *Blower*, appeared for the other parties.

THE VICE-CHANCELLOR:—Before I part with this case, I will look through all the authorities from the beginning to the end. I confess that, at present, I have a strong impression on my mind, that there is no case in which the court has held the wife's right by survivorship to be barred, where the husband has, for a valuable consideration, assigned his *wife's [*315] equitable *chose in action*, which was capable of being reduced into possession at the time, and has died before the assignee has attempted to reduce it into possession.

April 1st.—THE VICE-CHANCELLOR:—After repeated discussion, in the case of *Purdew v. Jackson*, before Sir Thomas Plumer and by Sir Thomas himself, he said: "After this repeated consideration of the subject, I still continue of opinion, that all assignments made by the husband of the wife's outstanding personal chattel, which is not or cannot be then reduced into possession, whether the assignment be in bankruptcy, or under the

(*a*) 3 P. W. 197.

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insolvent acts, or to trustees for payment of debts, or to a purchaser for valuable consideration, pass only the interest which the husband has subject to the wife's legal right by survivorship."^(a)

In that case, Mrs. Bolton being entitled to a share of 3*l*. per cents. after the death of Isabella Purdew, she and her husband executed an assignment of her share to Rose for valuable consideration. Then Bolton, the husband, died. Afterwards Isabella Purdew died; and the question was, whether Rose was entitled to the share, or Mrs. Bolton and those who claimed under her. And Sir Thomas Plumer, in conformity with what he had before said, decided that Rose was not entitled, but that the share belonged to Mrs. Bolton and those who claimed under her.

Precisely the same question arose in *Honner v. Morton*,^[*316] ^(b) and the present Lord Chancellor decided in *the same way. Upon the question that arose in those two cases I must consider the law as settled.

In the course of the first argument in *Purdew v. Jackson*, the Master of the Rolls put this question: "Is there any case in which the husband having assigned the wife's present *chose in action*, and having died before the assignee obtained possession of it, the assignee prevailed over the surviving wife."^(c) The leading counsel on both sides, one of whom was the present Lord Chancellor of Ireland, said: "We believe that such a case has not occurred." A note to the report seems to call in question the accuracy of that answer, and it refers to the case of *The Earl of Salisbury v. Newton*, and to the case of *Bates v. Daudy*, of which, besides the report in Atkyns, one statement is given in a note to *Purdew v. Jackson*, at page 33, and another in a note to *Honner v. Morton*, at page 72. It appears from the report of *The Earl of Salisbury v. Newton*, in 1 Eden, that the only point made by the counsel for the widow, was that she was entitled to

(a) 1 Russ. 70.

(b) 3 Russ. 85.

(c) 1 Russ. 19.

1843.—*Ellison v. Elwin*.

have a settlement; and, as to *Bates v. Daudy*, Lord Lyndhurst, in 3 Russ. p. 72, observes that no doubt could be entertained as to the husband's power over the property: and the application of that case to the present question, rests, not on the decree, but on a *dictum* which was wholly unnecessary for the decision of the actual points which were before the court: so that the answer of the counsel was, in substance, correct. As to the case of *Lord Carteret v. Paschal*,^(a) on which Mr. Anderdon seemed to lay great stress, it actually was decided on the ground, not that the husband could assign his wife's *chose in action*, but that he *might assign her interest in land in the nature of [*317] an equitable extent under Lord Cowper's decree. And it is also observable, from what is stated in page 199, that Lord King appeared to be of opinion that, if the wife's *chose in action* was not reduced into possession during the husband's life, it survived to her as against his assignee.

It is useless to be always travelling over the same ground. I consider the principle laid down by Sir Thomas Plumer, and twice affirmed by the Lord Chancellor, to be decisive of the present question. Whether the husband dies in the lifetime of the tenant for life, whereby the *chose in action* cannot, as against the wife, be reduced into possession, or whether he survives and dies before it is reduced into possession, the same result must, in my opinion, follow; and the consequence is, that, in the present case, a declaration must be made that Mr. Nicholson's covenant, which might operate as an assignment, does not now affect that portion of the *chores in action* of his wife, which was not reduced into possession in his lifetime.

(a) 3 P. W. 197.

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*HARRINGTON v. HARRINGTON.

*Appointment.—Power.—Will.—Construction.—7 Will. IV, & 1
 Vict. c. 26, s. 27.*

1843: 17th and 24th February.

A married lady having power, under her settlement, to dispose of real and personal property, to which her husband was entitled for his life; and her husband having agreed, subsequently to the marriage, that certain other personal property should be disposed of by her, in such manner as she thought proper, made a will commencing as follows: "I, Ann B., the wife of W. B., by the authority of my marriage articles, do make this my last will and testament. Whereas my husband is entitled to the whole of the rents and profits of my estates, both real and personal, during his life; from and after the decease of myself and my husband, I do hereby give, &c." The testatrix then proceeded to dispose of the property comprised in her settlement: and, after appointing executors, she gave all the rest, residue and remainder of her property, both real and personal, to G. H. Held, that the will was an appointment of the property comprised in the post-nuptial agreement, as well as of that comprised in the settlement.

THE bill stated and the answers admitted, that, in the year 1841, and prior to the date and execution of the memorandum after mentioned, Ann Battell, the wife of the Rev. Wm. Battell, both since deceased, became seised in fee, as heiress at law of Jannett Walmsley, of certain real estates situate at Preston, in Lancashire; that her husband, being desirous that she should have the absolute power and right of disposition of all such real estates and the proceeds thereof, executed the following memorandum in writing:—"I, the undersigned, the Rev. William Battell, hereby declare it to be my wish and intention to renounce any marital right which I may, or can have, or be supposed to have, to the moneys which shall arise or be produced from the property in Preston, Lancashire, which descended to my wife as heiress at law of the late Miss Jannett Walmsley, deceased; and, in order to effectuate such intention, I hereby agree and declare that the said moneys, when payable, *shall be received and taken by my said wife, and shall be applied and disposed of by her in such manner as she may think proper.* As witness

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my hand this *15th day of September, 1841." The bill next stated that, very shortly after the date and execu-

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tion of the memorandum, the real estates, to which Mrs. Battell so became entitled as aforesaid, were sold, and the produce thereof was laid out, by her direction, in the purchase, in her name, of exchequer bills, to the amount of 2,000*l.*, which were, with the privity and approbation of her husband, deposited by her at her banker's, and there carried to her separate account; that the interest of the exchequer bills was, from time to time, either paid by the bankers, to Mrs. Battell, to her separate use, or was carried, by them, to her separate account; that Mr. Battell made his will, bearing date the 15th day of October, 1841, and appointed his wife and the defendants Henry Thomas Davies and Thomas William Harrington, his executors; that, besides the power or right of disposition so given or reserved to her by the memorandum, Mrs. Battell was, at the time of making her will after mentioned, entitled to a general power of appointment, limited or reserved to her by the settlement made on her marriage with Mr. Battell, bearing date the 3d of October, 1808, over certain stock, moneys, and freehold and copyhold estates comprised in the settlement; and that she duly made and published her will bearing date the 15th of November, 1841, and which was to the purport or effect following:—I, Ann Battell, the wife of the Rev. William Battell, *by the authority of my marriage articles*, do make this my last will and testament. Whereas, my husband is entitled to the whole of the rents and profits of my estates, both real and personal, during his life; from and after the decease of myself and my husband, I do hereby give and devise and bequeath to my godson, Henry George Harrington, (the plaintiff,) all my freehold lands, tenements and premises at Tickhill, in the county *of York, to him and [*320] to his heirs forever. I give and bequeath to Mr. George Leeworthy Hulland, all my copyhold lands, tenements and premises situate at Chapelthorpe and Thomes, in the manor of Wakefield, in the county of York, which have been surrendered to the uses of my will, for his life, and, after his death, to his children by his present wife. After my just debts and funeral expenses are paid, I give, to Frances Caroline Matilda, the wife of Captain Harrington, 1,000*l.* (The testatrix then gave other pecuniary legacies in like terms, and disposed of her household

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furniture, linen and plate.) I do hereby constitute and appoint Captain Thomas William Harrington and Francis Henry Thomas, Esq., executors of this my will; and I do hereby give to each of them 800*l.*, upon condition, nevertheless, that they shall, within six months after the decease of myself and my husband, take out a probate of this my will, and duly execute the same; *and the rest, residue and remainder of my property, both real and personal, I hereby give to Henry George Harrington.*

Mrs. Battell died on the 20th day of September, 1842; and Mr. Battell died on the 30th of the same month; and their wills were proved by their executors respectively. Mrs. Battell's executors sold the exchequer bills and received the produce, together with the interest thereon, which was in the hands of her bankers; but they refused to pay over the same to the plaintiff, except under the direction of the court.

The bill prayed that it might be declared that, under the memorandum, Mrs. Battell became entitled to the absolute right or power to dispose of the exchequer bills and the interest accrued thereon, as part of her separate estate; and that her will [*321] was an effectual exercise of such right or power; and that the plaintiff had, consequently, become entitled to the whole of the produce of the exchequer bills and interest, and that her executors might be ordered to pay the same to the plaintiff: or that the interest of the plaintiff and all other persons therein might be ascertained and declared.

The defendants, Thomas William Harrington and Francis Henry Thomas, Mrs. Battell's executors, submitted to the judgment of the court, whether the memorandum did or was intended to confer, on Mrs. Battell, an actual power or right to dispose of the exchequer bills, as part of her separate estate; and whether the same was a good, valid and subsisting power at the time when she signed her will, without any reference as to whether she should or not survive her husband; and whether her will operated as a valid and effectual exercise of all powers which were, in any manner, vested in her; and whether the ex-

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chequer bills and interest passed under, and the right to the same became immediately vested in the plaintiff, by virtue of her will, as an execution of the power; and whether the defendants had no right to receive and no title to retain the same.

The defendant Davies, one of Mr. Battell's executors, submitted that the memorandum did not actually confer any absolute right or power upon Mrs. Battell, to dispose of the said exchequer bills and interest, by any will or testamentary disposition thereof during the lifetime of her husband; and that her husband having survived her, her will became wholly inoperative as to the exchequer bills and interest: that, even if Mrs. Battell had any right or power to dispose of the exchequer bills and interest by any will or testamentary *disposition, her will [*822] was, expressly and exclusively, confined to the stock, moneys and freehold and copyhold estates, over which a power of disposition was reserved to her by her settlement, and that the same did not extend to any other property: and that, under the circumstances aforesaid, the exchequer bills and interest were wholly undisposed of by her and formed part of her personal estate.

•
The cause now came on to be heard as a short cause.

After the pleadings had been opened, the Vice-Chancellor asked the plaintiff's counsel at what time and by whom the estate at Preston had been sold: and, the counsel not being instructed upon those points, his Honor postponed the hearing of the cause until the particulars inquired after had been ascertained.

February 24th.—The following information was now communicated to the court.

- The estate was sold by private contract, by Mrs. Battell's order, on the 9th of October, 1841, having been previously advertised and offered for sale, by public auction, on the 9th of the preceding month. It was conveyed to the purchaser by lease

 1843.—Harrington v. Harrington.

and release, by Mr. and Mrs. Battell and Mr. Harris, the surviving trustee under Miss Walmsley's will, by which, in 1825, she devised her real estate to Harris and William Cross, since deceased, to hold to the use of certain persons, all of whom died in Miss Walmsley's lifetime. Miss Walmsley died in January, 1839, leaving Mrs. Battell, her niece and only surviving relative, and who, thereupon, became entitled to all her real and personal property. The sale was actually advertised at the time when the memorandum of the 15th of September, 1841, was signed.

[*323] *Mr. *Bethell* and Mr. *Hetherington*, for the plaintiff, said that, under the memorandum of September, 1841, Mrs. Battell had power to dispose of the proceeds of the sale of the Preston estate, in such manner as she might think proper; and that *Curteis v. Kenrick*,^(a) decided that a married woman having a power to dispose of property, might make an effectual disposition of it, notwithstanding she referred neither to the power nor to the property: and that all doubt upon the point, if any still remained, was removed by the recent act for amending the laws with respect to wills, 7 Will. 4 & 1 Vict. c. 26:^(b) and that now there could be no doubt that the residuary gift in Mrs. Battell's will, was an effectual appointment, to the plaintiff, of the exchequer bills in which the proceeds of the sale had been invested.

Mr. *Wakefield*, Mr. *Stinton* and Mr. *Elderton* for the
[*324] defendants, said that there were two questions in *the case, first, whether Mrs. Battell had any power to dis-

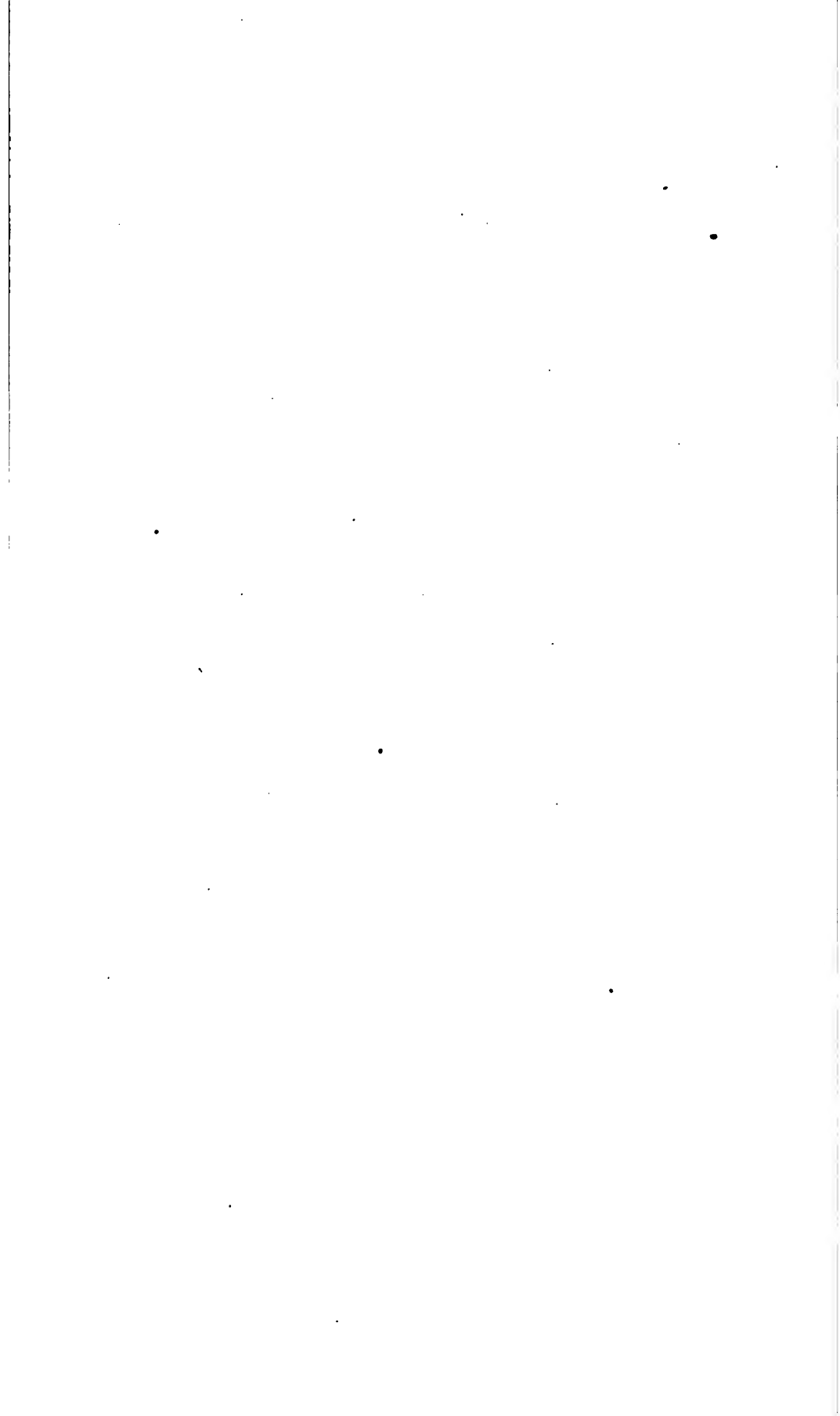
(a) *Ante*, Vol. IX, p. 443.

(b) The 27th section enacts that a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend, (as the case may be,) which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and, in like manner, a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend, (as the case may be,) which he may have power to appoint, in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.

pose of the proceeds of the sale, and, secondly, if she had the power, whether she had exercised it.—[THE VICE-CHANCELLOR:—Is not a will a manner of disposing of property?—]Supposing that she had the power, her will is not a good execution of it. For, at the commencement of it, she says, expressly, that she makes it *by the authority of her marriage articles*; and, therefore, it is evident that she did not intend it to be an execution of any other power, or to operate upon any property except that which she had power to dispose of under her marriage articles. And, that being so, the court cannot hold that the will is a good execution of any other power; inasmuch as: “a contrary intention appears by the will.”

THE VICE-CHANCELLOR:—As I understand this case, Mrs. Battell had a power, under her marriage settlement, to dispose of the freehold, copyhold and personal estate therein comprised: and, at the commencement of her will, she says that she makes it by the authority of her marriage articles. The fact is that she had two powers, one under her marriage settlement, and the other, under the memorandum of the 15th of September, 1841. Then, after having disposed of the real and personal estate comprised in the settlement, she appoints executors; and then says: “and all the rest, residue and remainder of my property, both real and personal, I hereby give to Henry George Harrington.” Now, the construction contended for by the counsel for the defendants, would prevent that residuary clause from having any effect whatever.(a) But I cannot *think that [*325] that is the right construction: and, therefore, I shall declare that the exchequer bills passed by the will of Mrs. Battell.

(a) It did not appear that the testatrix had disposed, by the particular devises and bequests in her will, of the whole of the property which she had power to appoint by virtue of her settlement; but, on the contrary, the defendants stated in their answers, that they believed that the personal property which she had power to appoint under her settlement, was more than sufficient to satisfy her funeral and testamentary expenses, debts and legacies. The will, too afforded an argument (in addition to those adduced by the defendants' counsel,) that it was not intended to be an exercise of any power, except that reserved by the settlement, namely, that the legacies to the executors were given on condition that they proved the will within a certain time after the death of the husband, who had a life interest under the settlement.



REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
HIGH COURT OF CHANCERY,
BEFORE THE
VICE-CHANCELLOR.

*JUMPSSEN v. PITCHERS.(a)

[*327]

Statute of Limitations, 3 & 4 Will. IV, c. 27.—Title.—Length of Time.

1843: 1st March.

If husband and wife, being seised in fee in right of the wife, convey to a purchaser, by deed without fine; the wife, if she survives, and, if not, her heir, may, on the husband's death, recover the land, notwithstanding the purchaser may have been in possession for more than forty years.

It having been referred to the master, to inquire and state whether a good title could be made to certain freehold tenements which the plaintiff had agreed to sell to the defendant, the master reported in the negative.

It appeared, on the hearing of exceptions taken by the plaintiffs to the report, that the plaintiffs made out their title through one Elms Foster, to whom Thomas Jones and Sarah, his wife, (whose maiden name was Harris,) conveyed the tenements, by lease and release dated the 3d and 4th of September, 1772, in obedience to a decree of the court made in a suit of *Cole v. Harris*. The marriage of Mr. and Mrs. Jones took place subsequently to the decree; and the release recited it and contained a covenant, on the part of Jones, *that he and his wife [*328]

(a) 1 Collyer, 18

 1843.—*Jumpsen v. Pitchers*.

would levy a fine of the tenements to Foster; but it did not appear that the fine was ever levied, nor was it shown at what time the coverture between Mr. and Mrs. Jones determined.

The counsel having declined to take a case for the opinion of a court of law,

Mr. *Bethell* and Mr. *Addis*, in support of the exception, said first, that the conveyance to Foster was made more than seventy years ago, and, as the possession had gone according to that conveyance for so great a length of time, the court ought to presume that the fine which Jones and wife had agreed to levy, was actually levied.

Secondly, they cited *Doe v. Bramston*,^(a) in which case [*329] a husband and wife abandoned the possession of *property of which they were seised in right of the wife, and

(a) 3 Adol. & Ell. 63. See Sir E. Sugden's observations on that case, 2 Vend. & Purch. 347 *et seq.* That learned author puts a case similar to the one reported in the text, and makes the following remarks upon it: "The decision in *Doe v. Bramston* may be held to govern a case which frequently occurred before fines and recoveries were abolished, and will, no doubt, still often arise. I allude to a conveyance by husband and wife, of her fee simple estate, by a conveyance not operative to bind her; the operation of such a conveyance was to pass the husband's interest in his marital right, or as tenant by the curtesy, as the case might be, and the wife, or her heir, was entitled to recover upon the determination of that estate; from which time, but not before, time ran against them. It may be considered difficult to distinguish that case from *Doe v. Bramston*, where possession follows the conveyance; for that decision has established that a married woman is within the first case provided for by the third section, and, therefore, time will run against her if she and her husband discontinue the possession: and, although she is from her disability within the savings, yet that her right will not endure beyond the forty years, notwithstanding that her husband himself, lived beyond that period; her right was not considered to be saved by the continuance of his estate by the curtesy, and adverse possession in the old sense, was not deemed requisite. Now, in the case supposed, the wife would equally quit the possession, and her rights would be saved to the same extent, viz.: for forty years; and it certainly is difficult, consistently with the above decision, to allow her any further time. But still, although now adverse possession is not necessary, there is a marked distinction between a conveyance and a mere vacant possession; for, after the conveyance, the husband could not enter

1843.—*Jumpsen v. Pitchers*.

the Court of Queen's Bench held that an action of ejectment brought by the eldest son of the husband and wife after their deaths, was barred under the 17th section of the Statute of Limitations, (3d & 4th W. IV, c. 27,) inasmuch as the abandonment of possession took place more than forty years before the action was commenced. They added that it was no longer requisite, in order to bar an ejectment, that the possession of the defendant should be adverse; but it was sufficient if the persons under whom the plaintiff claimed, had left the possession vacant, and the defendant had entered and continued in possession for the required number of years: and if, as was decided in *Doe v. Bramston*, the quitting of possession by the husband in the lifetime of the wife, and possession for forty years by the defendant, was sufficient to bar the wife and those who claimed under her, how much stronger was the present case, where the *possession was transferred under a decree of the court, [*330] and there had been possession under the decree for upwards of seventy years.

Mr. *Stuart* and Mr. *Spurrier*, in support of the report said, first, that a fine, being matter of record, could not be presumed by the court: secondly, that, in *Doe v. Bramston*, there was a discontinuance of possession by the husband and wife, according to the language and spirit of the statute; but, in the case before the court, there had been no discontinuance of possession; a party had been in possession under a conveyance, which, so far as the interest of the husband was concerned, was a rightful conveyance: that the occupation of a tenant under a lease for lives at a fine without rent, might be held to bar the lessor or his heir, if the possession of Foster and those who derived title under him, was held to bar the heir of Mrs. Jones; that Sir E. Sugden, in his observations on *Doe v. Bramston*, made a marked distinction between a possession under a rightful alienation, and a pos-

against his own act, and the wife would have no right to do so in respect of her estate; so that she might be barred altogether if her husband lived beyond forty years, without having had any power to recover. It may well be held, therefore, that where there is a conveyance, the case is not governed by *Doe v. Bramston*."

sion in the case of a vacancy ;(a) and that Lord Denman, C. J., said, in the case cited, that, if the persons actually in possession, could be shown *to have held under him through whom the plaintiff claimed*, the possession of the former might be regarded as the possession of the latter; that that *dictum* showed that, if the present case had been before the Court of Queen's Bench, the court would not have held that Mrs. Jones's heir was barred by the statute, for the possession of Foster and those who claimed under him, ought to be regarded as the possession of Jones and wife and those who claimed under them.

[*331] *Mr. Bethell in reply:—The case of a demise for lives, has no application to the present; the possession of the lessee is not distinct from the possession of the lessor; but, here, the possession of Foster was distinct from the possession of Jones. In the case put, neither dispossession nor discontinuance of possession, according to the language and spirit of the act, can have any existence. An alienee does not hold either as tenant to or *under* the alienor. He holds *through*, not *under* the alienor; a distinction which has not been sufficiently attended to by the counsel on the other side. There is no ground for the distinction, made by Sir E. Sugden, between the case of a conveyance made by the husband, and the case of his leaving the possession vacant. The reason given for the distinction is, that in the latter case, the husband may enter, but, in the former, he has disabled himself from entering. Upon the whole, I submit that there is no distinction between this case and the case of *Doe v. Bramston*.

THE VICE-CHANCELLOR:—The question in this case arises upon the application of the decision in *Doe v. Bramston* to the present case.

I must say that, in my opinion, there is a very material distinction between the case of a husband and wife making the possession derelict, as it was in the case of *Doe v. Bramston*, and the case where the husband and wife are seised in fee in right of the wife, and the husband, by a conveyance which does not bind the

(a) See the preceding note.

1843.—*Jumpsen v. Pitchers*.

wife, purports to convey the fee. Because the effect at law, is that that conveyance merely passes, to the grantee of the husband, that estate which he had and might have held during the continuance of the coverture. And I *cannot but think [*332] that, in that case, the right of the wife would come within the fourth description of interest in the third section of the Statute of Limitations: "And when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have claimed the possession or receipt of the profits of such land, or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession." Because the real effect of the husband's conveyance is not, strictly speaking, to create a remainder or reversion, but, by passing the interest which he at law had during the coverture in the freehold and inheritance of his wife, a future estate or interest arises to the wife, or to the heir of the wife if she predeceases her husband, upon the determination of the coverture: and then, as I understand the statute, the forty years, or the time for bringing the action, would commence from the time when the coverture determines. I apprehend that the wife and her husband have, all along during the coverture, the freehold and inheritance in her right; and if the husband chooses to convey the estate during the coverture, still the inheritance remains as it was before; but with this circumstance, that, upon the determination of the coverture, the future estate, that is to say, that estate which, in a certain sense, was future, immediately takes effect in possession in the wife, if she is the survivor, or in the heir of the wife, if she predeceases her husband. And, therefore, I apprehend that that would be "the future estate or interest," in respect of which the party might immediately bring an action and recover possession against any person who happened to be in possession.

*The case before me is not a case of relinquishment, [*333] but the case of an actual conveyance which the husband might lawfully make: and I cannot imagine that there is any resemblance between a case where there is merely an abandonment

of the possession, whereby no estate passes from the husband and wife, that is to say, no estate passes by any act of the husband, and a case like the one now before me, where the act of the husband has such an effect upon the whole inheritance, that, upon the determination of the coverture, the right remains in the wife if she survives, or in her heir, if she predeceases her husband.

Now, if the wife had died in the lifetime of the husband, then we should have had to consider what disabilities might have affected the heir, and so on; or, if the husband had died leaving the wife, we should then have had to consider whether she was under any disability: but, inasmuch as it is not found when the coverture did determine, my opinion is that it is quite impossible, in such a state of things, to coincide with the master who has found that the parties cannot make a good title.

And I must say that I do not conceive that I am at all infringing upon the opinion expressed by the Court of Queen's Bench; because I observed that my Lord Denman says: "If the persons actually in possession could be shown to have held under him through whom the plaintiff claims, the possession of the former might be regarded as the possession of the latter; but, in this case there was not a single fact from which such an inference could be drawn." I admit that the very terms used by Lord Denman, do not exactly apply to the case before me; but [*334] the slightest amplification of his *Lordship's language, would show that his opinion would have suited the very case that is now before me; because my opinion is that Foster, who took by conveyance from Jones and his wife, was a person who did hold under Jones, by means of the lawful estate which Jones could create, and the creation of which had the effect of making that which was the wife's present estate, a future estate within the meaning of the fourth description in the third section of the Statute of Limitations. Therefore it must be referred back to the master to review his report.

After the judgment had been pronounced, office copies of cer-

1843.—*Jumpeen v. Pitchers*.

tain orders, &c., in *Cole v. Nash*, were produced, from which it appeared that Foster paid his purchase money into court, and was let into possession of the tenements, before the marriage of Mr. and Mrs. Jones.^(a) Upon which his Honor intimated that the case fell upon the principle of *Doe v. Bramston*, and made an order allowing the exception, and referring it back to the master to review his report.^(b)

*It is submitted, however, that his Honor cannot be [*335] considered to have *decided* that the title was good, inasmuch as the effect of the orders in *Cole v. Nash* and of what had taken place under them, was not argued; nor indeed were those orders regularly before the court. Had it been otherwise, it might have been contended, perhaps, that the rightful title which Foster acquired by the conveyance, prevented the forty years from running during the continuance of that title, that is, during Jones' life.

(a) Although Mrs. Jones was mentioned in the orders by her maiden name, the fact was, that the marriage took place on the 14th of July, 1772, on which day the report of Foster being the purchaser of the tenements was absolutely confirmed.

(b) The counsel for the excoptant submitted that the exception ought not to be allowed, as it asserted that the master ought to have certified that a good title had been shown to the tenements. The VICE-CHANCELLOR said that he considered that assertion to be surplusage, and that he did not mean to intimate that a good title had been shown.

On the second reference, the orders, &c., in *Cole v. Nash* were produced, and the master then reported in favor of the title. The defendant excepted to the report. The exception was argued before Vice-Chancellor Knight Bruce, who considered the objection founded on the irregularity of the proceedings in *Cole v. Nash*, to be an objection, not of title but of conveyance, and overruled the exception. See 1 Collyers' Rep. 13.

N. B.—The plaintiff's name was sometimes spelt Jumpeen, and sometimes Jumpeon, as in Mr. Collyer's report.

1843.—*Roberts v. Roberts.*

[*336]

*ROBERTS v. ROBERTS.

Legacy.—Exoneration of Personal Estate.—Will.—Construction.

1843: 7th and 8th March.

Testator gave to the children of his daughter, a legacy of 2,000*l.*, to be paid and payable from and out of his manors, messuages, &c., and he subjected and charged the same to and with the payment thereof accordingly. Held, that the legacy was payable out of the testator's real estates only.

Testator after giving an annuity to his wife, devised his real estates to trustees in trust to pay the annuity thereout, and gave his wife powers of distress and entry on his estates. He then devised his estates in strict settlement, subject, expressly, to the annuity and to the powers of distress and entry. Held, nevertheless, taking the whole of the will together, that the testator's personal estate was primarily to pay the annuity.

JOHN ROBERTS made his will, dated the 22d of March, 1800, and, after directing his debts, funeral expenses and the charges of proving his will, to be paid by his executors and executrix, out of his personal estate, he gave to James Bishop, John Crutten-den and Thomas Sawyer, his manor and farm called Borezell, and other estates which he particularly described and mentioned to be then in his own occupation; and also all his ready money, securities for money, book debts, household goods and furniture, plate, linen, china, farming stock and utensils, and all other his real and personal estate, to hold the same to the uses, &c., thereafter expressed, (that is to say,) to the intent and purpose that his wife might have the free use and occupation of his capital messuage called Borezell, and such part of his household goods and furniture, plate, linen, china and other effects, as his trustees should consider necessary for her comfort and convenience, during her life, or so long as she should continue his widow:

“And also to the intent and purpose that she shall and may, by and out of the said manor, messuages, lands, woodlands, hereditaments and personal estate, or by and out of such part or parts thereof as my said trustees shall deem most proper and consistent with the true meaning of this my will, receive, during her
 [*387] life, or so long as she shall continue my widow, one annuity or clear yearly sum of 300*l.*, she maintaining,

educating and bringing up my son, John Roberts, and such other child or children as I may hereafter have."

The testator then empowered his wife, in case the said annuity or yearly sum should be in arrear for thirty days, to distrain, and, in case it should be in arrear for sixty days, to enter upon and receive the rents and profits of *all or any part of his said manor, messuages, &c.*; and he declared that the annuity so limited in use to his wife, and the other provisions made for her by his will, were given and limited to her in bar of all dower and thirds which she could claim out of any manors, messuages, &c., whereof he then was, or, at the time of his decease, should be seised; and that, within six calendar months after his decease, she should execute such release of all dower and thirds which she might be entitled to out of his said manor, messuages, &c., or out of his personal estate, as his trustees, or the person then entitled to his said manor, messuages, &c., under the limitations in his will, should require; and, in case she should refuse so to do, or should marry again, that all the gifts, bequests and provisions in his will, for her benefit, should cease.

"And as to, for and concerning my said manor, messuages, &c., hereinbefore devised to the said James Bishop, John Crutenden and Thomas Sawyer, (subject to the residence of my said wife in my said capital messuage called Borezell, *and charged and chargeable with the said annuity, or so much and such a proportion thereof as my said trustees shall, in their discretion, think prudent to lay on the same*, consistent with the true meaning of this my will, and to the several powers and remedies given and provided for securing the said *annuity,) to [*338] the use of my son, John Roberts, and his assigns, upon his attaining the age of twenty-one years, for his life." The testator then made limitations to the first and other sons of his son in tail male, and to his own second and other sons, and to other persons (one of whom was the plaintiff) for their lives, on their attaining twenty-one, with remainder to their first and other sons in tail male; and, in making each of those limitations, he repeated the words: "subject and charged as aforesaid." He next

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directed that such farming business as he should be engaged in at his death, on the devised estates, should be continued, by his trustees, until his son, John, should attain twenty-one, and, in case of his son's death under that age, then until the person next in remainder should attain that age; it being his intention that no remainder-man under the limitations of his will, should come to the possession of his said manor, messuages, &c., until he should have attained twenty-one. And he entreated his trustees, as soon as conveniently might be after his decease, to cause an inventory to be made of his *farming stock, goods, chattels, ready money, securities for money, and all his other effects*, in order to enable them the better to satisfy themselves of the advantages *resulting from the said business*. And he empowered them, during the minority of his son, John, and, in the event of his death under twenty-one, then during the minority of the person next in remainder under the limitations of his will, and so on, from time to time, until one of the persons in remainder should attain twenty-one, to fell, as well for sale as for repairs of any of the buildings belonging to his said estates, such timber as they should think prudent, and to place out the money arising by such sale on government or real security, in their names, and he directed that the principal and interest thereof should be considered [*339] *as part of his personal estate, and be subject to the bequests and dispositions thereof therein mentioned.*

And as for and concerning all and singular his personal estate thereinbefore bequeathed to the trustees, he declared that the same was so bequeathed to them upon trust to invest such part thereof as should not consist of farming stock, either on government or real security, and, *out of the interest thereof* and the profits of his farming business during the period that the same should be carried on by his trustees, in the first place, to pay the annuity or yearly sum of 300*l.* thereinbefore provided for his wife, and to invest the overplus of such interest and profits, in order that the same might accumulate for the purposes thereafter mentioned: which were, in the event of his having one or more daughters, to pay 1,000*l.* to each of them on their attaining twenty-one; and, in the event of his having two or more sons

who should attain that age, to divide the residue of his personal estate amongst them equally; and in the event of his having no son who should attain twenty-one, then to pay the whole of his personal estate, *subject to his wife's annuity, or to such a proportion thereof as his trustees should think proper to charge the same with*, consistent with the true meaning of his will, to his daughters equally, on their attaining twenty-one: but if his son, John, or any of his after-born son or sons should die without leaving a son, but leaving a daughter or daughters, then, in the event of the testator not leaving any daughter, to divide the whole of his said personal estate, *subject as aforesaid*, amongst the daughter and daughters of his sons in equal shares. And, after providing for the indemnity and reimbursement of his trustees, he appointed his wife, his trustees and his son, *John, upon [*340] his attaining a competent age, executrix and executors of his will; and he committed the guardianship of his son and any after-born children, to his wife during their minority, in case she should so long continue his widow.

The testator made a codicil dated the 4th of April, 1809, by which he directed his trustees to permit his son, John Roberts, to carry on his farming business, for his own use and benefit, when he should attain the age of eighteen years; and appointed the trustees joint executors of his will, and guardians of his children during their minorities: and he appointed his wife, during her widowhood only, and his son, John Roberts, *overseers* of his will, and requested them to see the same duly performed. The testator then expressed himself as follows: "And whereas I have, by my said will, given, devised and bequeathed to my said wife, Charlotte Roberts, one annuity *or clear yearly rent* or sum of 300*l.*, for her life or so long as she shall remain my widow, subject to the maintenance, education and bringing up thereof, of my said son, John Roberts, and of such other child or children as I might thereafter have; now my will is that my said wife shall not be subject to the maintenance of any or either of my children in respect of her said annuity, *yearly rent charge*, or sum of 300*l.*, but only to their education and clothing; nor shall my said son, John Roberts, be entitled to any provision for education, clothing or

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otherwise, from my said wife, from and out of her said annuity or *yearly rent charge* of 300*l.*, after he shall attain the age of eighteen years and shall take upon himself my farming business as aforesaid : and my will is that my aforesaid trustees shall carry on my farming business until my said son shall attain his [*341] said age of eighteen years, *and pay and apply the profits and produce thereof, or so much thereof as shall be sufficient for that purpose, for and towards the maintenance, but not education and clothing, of all and every my children, in such manner as they shall think proper, and place out the residue of such profits and produce, (if any,) together with such part of my personal estate as is directed to be placed out at interest by my said will, upon such security or securities, and to and for such ends, intents and purposes, and upon such trusts as, in and by my said will, is mentioned and directed concerning the profits and gains of my said farming business and my said personal estate thereby directed to be placed out at interest as aforesaid. But my will nevertheless is that the dividends, interest and produce of the moneys so to be placed out at interest, shall be paid and applied by my said trustees, if necessary, for and towards the maintenance of all other my children except my son, John, during their respective minorities, in such manner as my said trustees shall think proper : and if it shall happen that the annuity, *yearly rent* or sum of 300*l.*, shall be determined by the death or second marriage of my said wife, during the minority of any or either of my children, then I direct that the profits and produce to be received, by my said trustees, from my farming business, and the dividends, interest and produce of the said trust moneys, shall also be paid and applied for the education and clothing of all and every my children, or such of them as shall be under the age of twenty-one years.

“ And I give, devise and bequeath, unto my daughter Charlotte Roberts, for her life, in addition to what I have given to any daughter or daughters by my said will, *one annuity* [*342] *or clear yearly rent or sum of 200*l.*, to *be issuing out of all my aforesaid manors, messuages, farms, lands, tenements, hereditaments and real estates :* and I do hereby charge and

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make subject all and every of my said manors, messuages, farms, lands, tenements, hereditaments and real estates with and to the payment of the said annuity, yearly rent or sum of 200*l.*, and do authorize and empower my said daughter to raise and levy the same by distress and sale on the said hereditaments and premises charged therewith, when and so often as the same shall be behind and unpaid, &c., &c. Also I give and bequeath, unto such child or children as my said daughter shall happen to have, the legacy or sum of 2,000*l.*, to be paid to them, in equal shares and proportions, if more than one, share and share alike, when and as soon after the decease of my said daughter as they shall respectively attain the age of twenty-one years; *and to be paid and payable from and out of my said manors, messuages, farms, lands, tenements, hereditaments and real estates*; and I do hereby charge and subject the same estates with and to the payment thereof accordingly."

The testator died shortly after the date of his codicil, leaving his wife, and his son and daughter named in his will (who were his only issue) him surviving. The son died in 1839, without issue; and, thereupon, the plaintiff became tenant for life in possession of the testator's real estates.

The bill was filed against the testator's widow and sole surviving executrix, the plaintiff's eldest son, who was entitled to the first estate of inheritance in the testator's estates, and the children of the testator's daughter, who was dead. The questions were, first, whether the testator's personal estate was, as the plaintiff contended, the primary fund for payment *of [*343] the widow's annuity, or whether (as she insisted) his real estates were charged with it in exoneration of his personal estate: and, secondly, whether the legacy of 2,000*l.* given, by the codicil, to the children of the testator's daughters, was, as they contended, payable exclusively or primarily at least, out of the testator's real estates.

Mr. Wakefield and Mr. Dixon for the plaintiff:—The testator, in the first instance, devises all his real and all his personal es-

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tate to his trustees, and then he proceeds to declare trusts of that mixed fund. The first trust is, that his wife shall have the use and occupation of his capital messuage, and of such part of his household goods, &c., as his trustees shall consider necessary for her comfort and convenience, during her widowhood. The next is, that his wife shall, out of his real estates, and *also out of his personal estate*, receive an annuity of 300*l.* a year during the same period. It is true that power is given to the trustees, to charge the annuity upon such part or parts of the aggregate fund, as they shall deem most proper and consistent with the true meaning of the will: but they have not thought proper to exercise that discretionary power. It is true also that the testator, when he declares uses of his real estates, uses the words: "charged and chargeable with the said annuity to my said wife:" but those words mean nothing more than what he had before expressed. For we admit that, in the preceding part of his will, he had charged his real estates with the payment of the annuity; and all that we contend for is that his personal estate is primarily liable to pay it.

Again, when the testator declares trusts of his personal estate, he directs his trustees to invest such *part [*344] of it as shall not consist of farming stock, in government or real securities, and out of the interest, dividends and proceeds of the principal, and the profits of his farming business, *in the first place*, to pay the annuity, and then to accumulate the surplus. The codicil also affords strong, if not conclusive evidence, that the testator intended his personal estate to be the primary fund for paying the annuity: for, after having subjected the annuity to the burden of clothing and educating his children, he says that if the annuity shall determine by the death or second marriage of his wife, the dividends and interest of the securities in which his personal estate and the profits of his farming business shall be invested, shall be paid and applied for the education and clothing of his children. He plainly gives that direction, because he had subjected his personal estate to a liability, from which, in the event contemplated, it would be exempted. Moreover it may be remarked that the first taker of the real estates is

also the residuary legatee of the personalty. Under these circumstances it is impossible to contend that the personal estate is exonerated from the payment of the annuity. *Duke of Ancaster v. Mayer.*(a)

There may be some little difficulty with respect to the legacy of 2,000*l.* given by the codicil, as it is not charged expressly upon the personal, as well as the real estate; there is, however, nothing to show that the testator intended to exempt his personal estate from the payment of it. And the cases decide that a testator's personal estate is primarily liable to pay a legacy, unless there are either expressions or a manifest intention to exempt it. **Lord Inchiquin v. French*,(b) *Samwell v.* [*345] *Wake*,(c) *Harewood & Childs Case*.(d)

THE VICE-CHANCELLOR:—The question is whether there is any gift of the legacy except in the direction to pay it.

Mr. *Teed* and Mr. *Bacon* appeared for the defendant John Roberts, the plaintiff's eldest son, whose interest was the same as the plaintiff's.

Mr. *Bethell* and Mr. *John Evans* for the other defendants, the widow of the testator, and the children of his daughter Charlotte.

THE VICE-CHANCELLOR:—I will not trouble you with respect to the legacy of 2,000*l.* given by the codicil. The testator says: "I give and bequeath unto such child or children as my said daughter Charlotte shall happen to have, the legacy or sum of 2,000*l.* of lawful money as aforesaid, to be paid to them, in equal shares and proportions, if more than one, share and share alike, when and as soon after the decease of her, my said daughter, as they shall respectively attain the age of twenty-one years, and to be paid and payable from and out of my said manors, messuages, farms, lands, tenements and hereditaments,

(a) 1 Bro. C. C. 454.

(c) 1 Bro. C. C. 144.

(b) 1 Amb. 33.

(d) Ca. Temp. Talbot, 204, cited.

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and real estates." So that the gift of the legacy, the time at which, and the fund out of which it is to be paid, are all comprised in one and the same sentence. The words: "And [*346] I do hereby charge and subject the same *estates with and to the payment thereof accordingly," are superfluous. It is clear, therefore, that the personal estate is not liable to the payment of that legacy.

Mr. *Bethell* and Mr. *Evans* then proceeded to argue the question with regard to the annuity:—The question now before the court, is not a question of exemption from the payment of legacies in general, but of exemption with respect to this particular annuity. The real estate is given subject, expressly, to the annuity: but the personal estate is not so given: and when we find a gift of a fund subjected to a particular charge, and a gift of another fund not burdened with any charge, are we not bound to infer that the testator meant that other fund to be taken, by the donee, free from every charge? Would it not be plainly illogical to infer that the donor meant the same thing with regard to both gifts? *Burton v. Knowlton.*(a) In this case the real and personal estate are, both of them, given to the same person, who is not the sole executor nor even one of the executors: the real estate is given subject, expressly, to the payment of the annuity, and the *whole* of the personal estate is given by a bequest which is in its nature specific. Wherever those elements are found, there are the grounds of exemption. *Bootle v. Blundell.*(b) The scheme of the will in that case, is very analogous to the scheme of that now before us: and that case seems to decide that, whenever adequate provision is made, out of the real estate, to answer a pecuniary gift, and the whole of the personal estate is given away, the gift shall be confined to the real estate, and be exclusively charged upon it. The principle of that case was applied by Sir John Leach, Vice-Chancellor, in [*347] **Greene v. Greene,*(c) and *Michell v. Michell.*(d) All the grounds of exemption which existed in those cases, are to be found in this, with the additional circumstance that the per-

(a) 3 Ves. 107.

(c) 4 Madd. 148.

(b) 1 Mer. 193, and 19 Ves. 494.

(d) 5 Madd. 69.

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son who takes the personal estate takes the real estate also. In *Driver v. Ferrand*,^(a) a testator devised part of his real estates to Ferrand and Smith, in trust to receive the rents, and to apply the moneys arising therefrom for the liquidating his debts, &c.; and then, in a subsequent part of his will, he bequeathed all his personal estate, enumerating the particulars of which it consisted, to Ferrand, who was joined in the executorship with Smith; and Sir John Leach, M. R., came to the conclusion, which his prior decisions warranted, that the testator could not have intended his personal estate to be applied to pay his debts in exoneration of the real estates before charged with them. *Blount v. Hipkins*,^(b) decides that, where the personal estate is specifically given, and provision is made for payment of debts out of real estate, the exoneration of the personal estate will not be affected by the legatee of the personal estate being also the sole executrix. The result of these authorities is, that, where there is a specific gift of personal estate to an individual, coupled with a provision for payment of debts out of real estate, you have all the elements of a case of exoneration of the personal estate from the payment of the debts. Two cases have drawn the distinction, in a very marked manner, between the personal estate being exonerated from the payment of debts, and being the primary fund for payment of them. Those cases are *Spurway v. Glynn*,^(c) and *Hancox v. Abbey*.^(d) In the latter of those *cases, [*348] Sir W. Grant, M. R., says:—"The intention in this will is very strongly manifested by the manner in which this devise is made. Then, is that intention rebutted by the mode in which the personal estate is given, it is true, after payment of all just debts and legacies? But, if I put the true construction upon the preceding part, and if the intention was exclusively to appropriate the real estate to that particular debt, this part of the will must be construed so as to make it consistent with what was already done. This is not a case of direct and utter repugnance, so as to compel an election which part shall stand; but if the construction upon the first part is sound, it may be said, in

^(a) 1 Russ. & Myl. 681.^(g) *Ante*, Vol. VII, p. 43.^(c) 9 Ves. 483.^(d) 11 Ves. 179; seq. 188.

fair reasoning, he means, by the latter part, to subject his personal estate to all such debts only as he has not already provided for by subjecting the real estate exclusively to them; for those debts are put out of the question, as if they did not exist; being already amply provided for. Therefore, afterwards, he provides only for all other debts. The very same expression occurs in *Hale v. Cox*; only in a different part of the will. It does not appear to have struck Lord Thurlow that this provision, in the preceding part of the will, made much difference as to the construction upon the clause providing for the particular debt; and the distinction, whether the direction to pay all the debts out of the personal estate is in the beginning or end of the will, is too slight. It might be material, if there was a direct and utter repugnance that could not, by construction, be reconciled; not where it is easy, by construction, to reconcile any apparent repugnance. If the will shows a clear and manifest intention that this mortgage shall be a burden upon the real estate, it amounts to this, that it shall not be considered a debt of this testator's as to his personal estate."

[*349] *We submit that, according to the true construction of the will, and on the authority of the cases to which we have referred, the court must hold that, in the event, which happened, of the testator's son becoming entitled under the limitations of the will, he took the personal estate freed from the annuity.

Mr. *Wakefield*, in reply, observed that it was a mistake to say that the son took an interest in the *whole* personal estate under the trusts of the will; because the legacies of 1,000*l.* each, to the testator's daughters, as well as his wife's annuity, were payable out of it.

THE VICE-CHANCELLOR:—In order to determine whether the testator intended his personal estate to be exonerated from the payment of this annuity, I must look at the whole of his will.

The rule of law is that, *prima facie*, debts and legacies are pay-

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able out of the personal estate ;[1] and, if an annuity or a legacy is given out of a mixed fund consisting of realty and personalty, the personalty is primarily liable to the payment of it, unless it is exempted from that liability, either by express words or by the manifest intention of the testator to be collected from the context of his will.[2]

Let us, then, see what the testator in this case has done. In order to ascertain his intention with regard to the point in dispute, it will be necessary to look at a great number of clauses in his will.

He sets out with directing his debts, funeral expenses, and the charges of proving his will, to be paid by his executors and executrix out of his personal estate. On *that, no [*350] doubt arises ; for there is nothing in the whole will to contradict it. He then gives all his real and all his personal estate to his trustees, to the intent and purpose that his wife shall have the use and occupation of his capital messuage, and such part of his household goods, &c., as his trustees shall consider necessary for her comfort and convenience ; and also to the intent and purpose that she shall, by and out of his real and personal estate, or by and out of such part or parts thereof as his trustees shall deem most proper and consistent with the true meaning of his will, have, receive and take, during her life or widowhood, one annuity or clear yearly sum of 300*l*. Here the testator seems to have had an idea that his trustees would have the power of fixing upon some particular part either of his real or his personal estate, for securing the annuity ; and the same idea occurs in subsequent passages in his will. Next, he gives

[1] *Lupton v. Lupton*, 2 John. Ch. 623 ; *Gridley v. Andrew*, 8 Conn. Rep. ; *Van Winkle v. Van Barton*, 2 Green. Ch. R. 172. Where a testator, in his will, devises lands to a devisee in fee, and then gives several legacies to be paid by such devisee, and the devisee survives the testator, and then dies, his personal estate is the primary fund for the payment of such legacies. *McLachlan v. McLachlan*, 9 Paige Ch. R. 534.

[2] Where a testator, in his will, charges a legacy upon a particular estate, and declares that it is to be raised out of such estate and not otherwise, the general estate is not liable for the payment of the legacy, in the event of the particular estate being insufficient for that purpose. *Powell et al. v. Murray et al.*, 10 Paige Ch. R. 256.

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her the ordinary powers of distress and entry; and then he says: "And, as for and concerning my said manor, messuages, &c., subject to the residence of my said wife in my said capital messuage, and charged and chargeable with the said annuity, or so much and such a proportion thereof as my said trustees shall, in their discretion, think proper to lay upon the same consistent with the true meaning of this my will, and to the several powers and remedies given and provided for securing and recovering the whole of the said annuity." Now, though this seems to imply that the trustees would have the power of directing that a certain part of the real estates should be exclusively charged with the annuity, still it is plain that the powers of distress and entry might be exercised over the whole of those estates. The testator then proceeds to limit his estates to his sons and other persons for their lives, and to their first and other sons [*351] in tail male. Nothing, however, arises on those *limitations. He then directs his trustees to carry on his farming business during the minority of his son, and directs them to cause an inventory to be made of his farming stock and other effects, in order to enable them to satisfy themselves of the advantages resulting from that business. It is rather remarkable that he does not provide for their discontinuing the business in the event of their finding it to be disadvantageous. Then he empowers his trustees to cut timber on his estates, as well for sale as for repairs, and directs them to invest the money to arise from the sale, in the usual manner, and the principal to be considered as part of his personal estate. Next, he says: "And, as for and concerning all and singular my personal estate hereinbefore given and bequeathed to them the said James Bishop, John Cruttenden and Thomas Sawyer, I do hereby declare that the same is so given to them upon trust that they do and shall lay out and invest such part of my personal estate as shall not consist in farming stock and effects on my said lands and premises, either on government or good real security, and by, with and out of such principal money and the profits and gains arising from my said farming business, during the period the same shall be conducted and carried on by my said trustees as aforesaid, in the first place, to pay and satisfy the said annuity

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or yearly sum of 300%." Now it is observable that the testator, in the first part of this sentence, speaks of the whole of his personal estate; and, if it be made a question whether the annuity is payable out of the profits of the farming business alone, or out of the aggregate fund composed of the interest and dividends of the personal estate and the profits of the business, my opinion is that, according to the true construction of the sentence, it is payable out of the aggregate fund. Then he directs the trustees to invest the overplus of the *interest, dividends [*352] and profits, and to pay legacies to his daughters; and, in the event of his having two or more sons who should live to attain twenty-one, to pay and divide all the rest, residue and remainder of his said personal estate unto and amongst them in equal shares. I am of opinion that those words, "rest, residue and remainder," have not the effect of cutting down the previous direction to pay the annuity out of the interest, dividends and proceeds of the principal money before spoken of. Then he says: "But, in the event of my present or any after-born son or sons dying without leaving a son that shall live to attain the age of twenty-one years, and of my leaving one or more daughter or daughters, then I direct my said trustees to pay the whole of my said personal estate, subject to the annuity of my said wife, or to such a proportion thereof as they shall think proper to charge the same with, consistent with the true meaning of this my will, unto my said daughters," which appears to be absolutely inexplicable; but it is certain that the thing which was to be paid to the daughters, was the residue of the personal estate subject to the annuity, unless the trustees could charge it on some part of the real estates, as I have before mentioned. Then the testator appoints his wife and his trustees, and his son on his attaining a competent age, joint executrix and executors of his will; and there is nothing else that is material in it.

Now we have to consider the contents of the codicil. By it, the testator directs his trustees to permit his son to carry on the farming business, for his own benefit, when he shall arrive at the age of eighteen years. That direction, however, takes away a portion only of the fund which, under the will, was applicable to

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pay the annuity. Then he directs that his wife's annuity, *which, by his will, he had made subject to the maintenance, education and bringing up of his children, should be subject to their education and clothing only, and that they should be maintained out of the profits of his farming business. Then comes a sentence which throws some faint light upon the question: "And, if it shall happen that the annuity, yearly rent or sum of 300*l.*, by my said will devised and bequeathed unto my said wife and her assigns for her life or widowhood as aforesaid, shall be determined by the death or second marriage of her, my said wife, during the minority of any or either of my said children, then I direct that the profits and produce to be received, by my said trustees, from my farming business, and the dividends, interest and produce of the said trust moneys, shall also be paid and applied for the education and clothing of all and every of my children." From which it appears that the testator meant that, if the annuity should cease by the death or second marriage of his wife, the liability to maintain his children, to which it had been subject, should be thrown on his personal estate: and that sentence supports the inference, to be collected from the words of the will, that the testator meant, agreeably to the rule of law, that his personal estate should be the primary fund for payment of the annuity.

Declare that the annuity is primarily a charge upon the testator's personal estate, and that the legacy of 2,000*l.* given by the codicil, is a charge on his real estates alone.

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*CRESY v. BEAVAN.(a)

Pleading.—Demurrer.

1842: 24th November.

The plaintiff amended his bill after the defendant had answered it. The amendments changed the nature of the case. Held, that the defendant might demur to

(a) The reporter was unable to procure the papers in this and the next case, until it was too late to report them according to their dates.

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the amended bill, although he had answered that which was part of the formal groundwork both of the new and of the original case.

THE bill was amended after the defendant had answered it. The defendant put in a general demurrer to the whole of the amended bill: and the question was whether he was at liberty so to do, inasmuch as, though the relief prayed by the amended bill was different from that prayed by the original bill, the statement of the former was the same, in part, as the statement of the latter, and, consequently, the demurrer covered matter which the defendant had answered.

Mr. *Bethell* and Mr. *Beavan*, in support of the demurrer, relied on *Ellice v. Goodson*.(a)

Mr. *Wakefield* and Mr. *Faber* appeared in support of the bill.

THE VICE-CHANCELLOR :—When the case of *Ellice v. Goodson* was before me, I decided it on a principle which Lord Chancellor Cottenham admitted to be the right one; and the only question between us, was with what effect, for the purpose of transmuting the character of the record, the amendments had been introduced. I read over the whole record, with the utmost attention, before I pronounced my judgment on the demurrer in that case; and the conclusion that I came to, was that the amendments *had transmuted the character of the original case. [*355] Whether the matter was thoroughly investigated before Lord Cottenham, I do not know. I am inclined to think that it was not. At all events, the principle was admitted.

Now I have looked at the record in this case, after hearing the discussion which took place yesterday: and it appears that the case, originally, stood thus. It represented that the bond which was the principal subject of the bill, had been actually satisfied.(b) No account was prayed; but the bill asked that, because the bond had been satisfied in the manner stated, it might be delivered up

(a) 3 Myl. & Cr. 653.

(a) See *Cresy v. Beavan*, *ante*, p. 99.

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to be cancelled, and, of course, that an injunction might be awarded to restrain the plaintiff from proceeding with the action which he had commenced upon the bond. Then the defendant having made, in his answer, a very special statement, of which no notice had been taken in the original bill, the plaintiff thinks proper to amend his bill by introducing that statement into his original bill, as a pretence made by the defendant, and to qualify it with charges which, at the same time, go to set up the fact that the substance of the pretence is true: and then he asks to have quite a different kind of relief from that which he had asked before: namely, to have an account taken of what (if anything) is due from him to the defendant, upon the bond.

In my opinion, however, the very way in which he has stated what has taken place, shows that the circumstances do not constitute a case for an account, but amount, in effect, to payment *pro tanto*; of which cognizance may be taken in a court of law.

Certainly, there is no case for an account. And my [*356] opinion is *that, inasmuch as there is a transmutation of the nature of the case by the amendments, the first and right thing is to consider it in the same manner as if it were a new bill: and the mere fact that the defendant has, by his former answer, answered that which is part of the formal groundwork both of the original case and of the new case introduced by amendment, is not a reason why I should not allow the demurrer to the amended bill: and I shall allow it accordingly.(a)

(a) Affirmed by the Lord Chancellor on the 11th of October, 1843. See *Walford v. Pemberton*, *post*.

JERMY v. PRESTON.

Will.—Revocation.

1842: 10th December.

A. being seised in fee of an estate, subject to a term for raising 5,000*l* for B., made a devise, in general terms, sufficient to comprise the estate. Afterwards, part of it was sold for the remainder of the term, for 7,600*l* under a decree for raising the

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5,000*l.*; and A. sold the reversion to the purchaser for a further sum; and an assignment and conveyance were made to complete the sales. The 5,000*l.* was paid to B. out of the 7,600*l.*; but the surplus remained in court until long after A.'s death. Held that, as an excessive sale had been made under the decree, the surplus retained the character of real estate, and that, notwithstanding the assignment and conveyance, the devise remained unrevoked with respect to it.

BY lease and release of the 4th and 5th of October, 1751, being the settlement on the marriage of William Jermy with Frances Preston, real estates were limited to William Jermy for life, with remainder to trustees for 500 years, with remainders to the sons of the marriage successively in tail male, with remainder to the daughters as tenants in common in tail, with remainder to William Jermy in fee. The trusts of the term were for raising 5,000*l.* for Frances Preston, in case there should be no issue of the marriage living at William Jermy's death.

William Jermy, by his will dated the 12th of December, *1751, devised his reversion in the estates to Frances, [*357] his wife, for her life, with remainders to Jacob Preston and his first and other sons, and to Thomas Preston and his first and other sons in strict settlement, with remainder to such male person of the name of Jermy as should be nearest related to the testator in blood, in fee.

The testator died in January, 1752, without issue, leaving his wife surviving.

In 1754, Isaac Preston, who was the father of Jacob and the brother of Thomas, purchased the ultimate remainder in the devised estates from the person who answered the description of nearest in blood to the testator, and took a conveyance to himself in fee. In the same year, the testator's widow directed the trustees of the term to raise the 5,000*l.*, and to pay it to John Mitchell, whom she soon afterwards married. In Easter Term, 1756, Mr. and Mrs. Mitchell filed a bill against the trustees of the term and Jacob and Thomas Preston, for the purpose of having the 5,000*l.*, with interest from the testator's death, raised under the trusts of the term. On the 25th of February, 1762, a decree

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was made in the suit, (the title of which was *Mitchell v. Preston*), whereby the amount to be found due by the master, in respect of the 5,000*l.* and interest, and certain costs which were directed to be taxed, was ordered to be raised by sale or mortgage, with the master's approbation, of a sufficient part of the estates comprised in the term; and, in June, 1766, certain parts of those estates were sold, under the decree, for the then remainder of the term, and were purchased by F. Buxton for 7,600*l.*; and, on the 25th of the same month, the master made a report stating [*358] those facts, and that he *had allowed Buxton to be the purchaser. On the 11th of July following, the report was confirmed; and, in pursuance of an order dated the 26th of November, 1767, Buxton paid the 7,600*l.* into court, to the credit of the cause.

By lease and release and assignment of the 3d and 4th of December, 1767, after reciting, amongst other things, that the premises purchased by Buxton, were purchased in trust for Elizabeth Joddrell, and that she had agreed, with Isaac Preston, Jacob Preston and Thomas Preston, to purchase their respective interests in the same premises, for 8,900*l.*; it was witnessed that the trustees of the term, in consideration of the 7,600*l.* so paid into court as aforesaid, and in obedience to the decree, assigned the premises purchased by Buxton to two trustees, for the remainder of the term, in trust for Elizabeth Joddrell, her heirs and assigns, and to attend the inheritance; and it was further witnessed that, in consideration of the 8,900*l.*, Isaac Preston, Jacob Preston and Thomas Preston, conveyed their respective interests in the same premises, subject to the term and to the life interest therein of Mrs. Mitchell under William Jermy's will, to Elizabeth Joddrell in fee.

In pursuance of another order in *Mitchell v. Preston*, made on the 12th of December, 1767, 5,000*l.* was paid, out of the 7,600*l.*, to Mrs. Mitchell as the executrix of her second husband, who was then dead; and the remainder was invested in 2,869*l.* consols, in the name of the Accountant-General in trust in the cause. On the 25th of January, 1770, the master made his general

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report in pursuance of the decree; and, by payment *of [*359] the interest thereby found due on the 5,000*l.*, and the costs directed to be taxed, the fund in court was reduced to 1,701*l.* 9*s.* 10*d.* consols; and *that* sum remained in the name of the Accountant-General in trust in the cause, when the bill in *Jerry v. Preston* was filed.

Mrs. Mitchell died on the 18th of November, 1791, having received all the dividends that became due on the 1,701*l.* 9*s.* 10*d.* consols down to her death; but all the dividends that subsequently became due, remained in the bank, to the credit of *Mitchell v. Preston*.

Isaac Preston, who had been twice married, had one son, named Jacob, by Alice, his first wife, and three sons, named Isaac, Thomas and George, by Hester, his second wife. He made his will on the 25th of November, 1764, (which was between the date of the decree in *Mitchell v. Preston* and the sale to Buxton,) and thereby, after giving two annuities, and charging them on his estates in Beeston, Barton and Ashmenhall and the towns adjacent, and, after reciting that he was seised of certain contingent remainders in fee and reversionary estates and interests in several manors, messuages, &c., settled by him on his son Jacob and the heirs male of his body; in order to prevent any dispute concerning the same, he gave all his manors, messuages, &c., *in the towns thereinbefore mentioned or elsewhere in England*, and not thereafter, or by any codicil thereto mentioned and devised, to his son Jacob and the heirs male of his body, and, for want of such issue, to the children and heirs male of his own body,^(a) successively; and, for want of such issue male of his own or his son Jacob's body, to his (the testator's) brother Thomas and the heirs male *of his body; and, for want and in [*360] default of such issue male, to all and every his (the testator's) daughter and daughters and their heirs as tenants in common, or^(b) to his own right heirs. The will then proceeded thus: "And with regard to my personal estate or the estates by me purchased therewith, I give to my dear wife, Hester, and Mr.

(a) *Sic.* in brief.(b) *Sic.*

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Thomas Blake and their heirs, all that farm situate in Statham and Sutton, as also my estate in Horning, &c. &c., and all other my estates not included in any settled(a) and purchased by me, in trust to sell the said estates for the best price they can get for the same, and, as soon as they, in their discretion, shall think fit, and not before; and the money thereby arising I give and will to be applied, with the rest of my personal estate. I give to my dear wife Hester and Mr. Thomas Blake, all the rest and residue of my personal estate, and produce from the sale of my real estates, subject to the payment of my just debts, legacies in this my will or any codicil thereto given, and funeral expenses, in trust that they do put and place out the same and the produce thereof in either government, public or private securities, or in the purchase of any estate, lands or hereditaments until the first of my sons Isaac, Thomas and George shall attain to his age of twenty-two years; and that they, my said executors, do then pay and deliver or assign one-third share or part of my said personal estate and trust money, to the first of my sons who shall so attain to his age of twenty-two years: and, in like manner, one moiety or share of the then remaining trust money, to my son who next shall attain to his age of twenty-two years, and the remainder to my son George in case it shall please God to prolong his days to twenty-two years: but, in case of the decease of any of my said younger children under the age [*361] of twenty-two *years, I will that the share of the child so deceasing, shall be divided equally amongst his surviving brethren. . . . And, lastly, I do hereby appoint my said dear wife, Hester Preston, and Mr. Thomas Blake, executrix and executor of this my last will and testament."

On the 13th of August, 1767, the testator made a codicil, the contents of which it is not necessary to state, except that he thereby ratified and confirmed his will. He died on the 9th of May, 1768, leaving his wife and all his sons named in his will, surviving. Jacob Preston, his eldest son and heir, died on the 28d of October, 1787, without issue male, and the defendants Sir George Henry Preston and George Heald became his co-heirs.

(a) *Sic.*

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Thomas, the brother, and Isaac and Thomas, the sons of Isaac Preston, the testator, died respectively in September, 1775, May, 1796, and May, 1807, without issue; and George, the remaining son, died in October, 1837, leaving the plaintiff, who afterwards took the name of Jermy, his eldest son.

The bill in *Jermey v. Preston* was filed in March, 1840, at which time the plaintiff had become the personal representative of Isaac, the testator, and also of his sons, Isaac and George; and the defendant James Alexander, was the personal representative of Thomas Preston, the testator's other son; and the defendant Blake was the heir of Thomas Blake, who survived Hester Preston, his co-trustee. No disposition had been made of the 1,701*l.* 9*s.* 10*d.* consols since the death of Isaac, the testator but the plaintiff had executed a disentailing deed respecting it.

The bill alleged that the 1,701*l.* 9*s.* 10*d.* consols **were* [*362] *of the nature of real estate*; and that Isaac, the testator, was, at the time of making his codicil and, thenceforth, until his decease, absolutely entitled thereto, *as real estate*, in remainder expectant upon Mrs. Mitchell's death and the determination of the intermediate limitations in the will of William Jermy before referred to; and that the fund was well devised, by Isaac's will and codicil, to his sons, Isaac, Thomas and George, *successively, in tail male*; that Mrs. Mitchell died in November, 1791, having received all the dividends of the fund that became due to her; that Isaac, the son, and his brother Thomas, died respectively, in May, 1796, and May, 1807, without having had any male issue or barred their estates tail in the fund; that George Preston, their brother, died in October, 1837, leaving the plaintiff his eldest son and heir, and who, thereupon, *became entitled to the fund as tenant in tail under the will of Isaac, the testator*; that the plaintiff had barred his estate tail in the fund and the remainders and reversions expectant and depending thereupon, and, by the means aforesaid, had become absolutely entitled to the fund; and that, in his own right and as the personal representative of George Preston, his father, he was also entitled to all the divi-

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dends which had accrued due on the fund since the death of Thomas Preston, the son.

The bill prayed that the will and codicil of Isaac Preston, the testator, might be established and the trusts thereof be performed; and that the rights and interests to and in the fund and the dividends accrued due since Mrs. Mitchell's death, might be ascertained; and that the plaintiff might be declared to be entitled to the fund and to the dividends accrued since Thomas Preston's death: or, in case it should appear, to the court, that [*363] the plaintiff was not so entitled, but that *the fund was part of the personal estate of Isaac Preston, the testator, then that the plaintiff, as his father's personal representative, might be declared to be entitled to one-third of the fund and of the dividends accrued since Mrs. Mitchell's death.

The cause was heard in April, 1841; and, in obedience to the decree then made, the master found the several facts mentioned in the statement of this case. The cause now came on for further directions.

Mr. *Bethell* and Mr. *Bird*, for the plaintiff, said that, as the court had sold more of the premises comprised in the term of 500 years created by William Jermy's will, than was necessary for the purposes of the decree by which the sale was directed, the surplus proceeds, after answering those purposes, must be considered as real estate; and that, as such, it was comprised either in the first, or in the second devise made by the will of Isaac Preston, the testator, and that, in either case, the plaintiff was entitled to it: and they cited *Charman v. Charman*,^(a) in order to show that, under the circumstances of the case, the devise was not revoked by the conveyance and assignment of December, 1767, to Elizabeth Joddrell and her trustees.

Mr. *Osborne*, for the defendant James Alexander, said that all the parties interested in the reversion expectant on the determination of the term, had joined in conveying their respective in-

(a) 14 Ves. 580.

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terests to Elizabeth Joddrell, and that, thereby, the reversion was wholly converted into personalty.

Mr. *Walker* and Mr. *Rolt* for the defendants *Sir Jacob [*364] Henry Preston, George Heald and Thomas Blake, said that, as the court had, by an improper use of the term of 500 years, raised more money than it ought to have raised, the surplus must be considered as of the nature of real estate, and that the conveyance to Mrs. Joddrell did not alter its nature; for that conveyance did not purport to deal with the surplus, but only with the land remaining unsold: and, consequently, nothing had been done to alter the nature or quality with which the surplus was impressed: that Isaac Preston's reversion in the Jermy estate was comprised in the second devise, as part of the estates which he had purchased and not settled; and the conveyance to Mrs. Joddrell was a revocation of that devise so far as the reversion was concerned; and the republication of the will by the codicil, could not have the effect of subjecting the fund in question to the operation of the devise, (a) as there were no words descriptive of it; and the consequence was that the co-heirs of the testator were entitled to it.

THE VICE-CHANCELLOR:—The conveyance, which was the act of the court, revoked the devise so far as the legal interest was concerned, but did not affect the equitable or beneficial interest in the fund. It represents the remaining beneficial interest in the Jermy estate: and though its local character is gone, it retains its beneficial character for enjoyment in the mode in which the Jermy estate was to be enjoyed.

Mr. *Bethell* having said, in answer to a question put to him by the Vice-Chancellor, that it was not necessary for him to be heard, in reply, upon the question whether *the [*365] fund passed by the first or by the second devise in the will,

(a) On referring to the statement of the case, it will be seen that the conveyance was dated subsequently to the codicil.

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His Honor pronounced the following judgment:—I agree with Mr. *Walker*, that, as the matter originally stood, the interest which the testator had in the Jermy estate, would have passed by the second devise in the will, because, in the first place, the testator having recited that he was seised of certain contingent remainders in fee and reversionary estates and interests in several manors, messuages, &c., by him already settled in a given manner, says: "I give and devise all and every my manors, messuages, lands, tenements and hereditaments in the said towns or elsewhere in the kingdom of England, with their appurtenances, and not hereinafter mentioned and devised." *Prima facie*, that would be a devise of all his lands except those after mentioned. Then, in a subsequent part of the will, he mentions certain specific tenements, and then goes on in these words: "And all other my estates not included in any settled and purchased by me." All which he devises. So that he gives the specific estates and all other estates purchased by him and not included in any settlement. That appears to me to be the plain construction of the words: and consequently, his interest in the Jermy estate, which had been purchased by him and not settled, would have passed by those words.

That being the case, and the will having been made in the year 1764, a decree was made, or, I should rather say, *had been* made in the year 1762: and then, after the date of the will, the master made a report, by which he stated that the term of 500 years in the estates, had been put up for sale; and that a certain [*366] *person had become the highest bidder and the purchaser; and that report was confirmed, absolutely, on the 11th of July, 1766: and, therefore, I take it that, as between the parties entitled to the estate and the purchaser, the estate, in equity, was sold.

Then the codicil was made, which operated as a republication of the will, and therefore would have the effect, as the will itself had, of passing all the testator's interest in the estates which he had purchased and not settled. Consequently, therefore, if, after

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that transaction which had taken place in court, he had any interest in the Jermy estate, that interest would pass.

Then it appears that the court itself had sold too much ; because it had sold, not merely what was sufficient to pay off what ought to have been raised, but had sold so much as would produce a surplus in money beyond what was necessary. And I quite agree with Mr. *Walker*, that the surplus money must be considered, in this court, as representing the original inheritance, the term in which it had been sold. Then, if it was the original inheritance, how would a court of equity deal with it ? Why a court of equity would say that the parties should have the same interest in the surplus money as they, originally, had in the inheritance of the land which was sold ;[1] and, if it had become necessary to dole out the particular interest of each individual strictly, the court would have directed that the money should be invested in the purchase of land, in order to give to each person originally entitled to the inheritance that had been sold, the precise interest in the money which represented a portion of that inheritance.

Then the conveyance was made ; and it appears that, *independent of the contract that was made by the court [*367] with the purchaser, for the sale of the term, there was a subordinate contract, by means of which the owners of that which was the estate in remainder after the term, agreed to convey their interests in the estate, that is to say, in the land itself, to Mrs. Joddrell. But nobody imputes to the parties, that the real meaning of the contract was that Mrs. Joddrell was to become, by the contract as represented in the conveyance of 1767, a purchaser back again of the surplus money which she had paid. The intention is too absurd to be imputed to any human being. The consequence, therefore, is that the conveyance left the question totally unaffected : and my opinion, therefore, is that, from the time when the money was contracted to be paid, when it was paid, and since, the surplus has done nothing but represent, in

[1] *Lorillard v. Carter*, 5 Paige Ch. R. 173, 218 ; *Van Vechten v. Van Vechten*, 8 Paige Ch. R. 106, 124, 129.

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the eye of this court, a portion of the inheritance of the Jermy estate. And it seems to me to be as plain as a point of equity can be, that, by the second devise in the will, the surplus passed.

I do not think that there was any revocation of it; because the rule is perfectly settled that, if a person having the legal estate of inheritance makes a mortgage of it by which his legal estate passes, and deals with the equity of redemption afterwards in the shape of a subsequent mortgage, the ultimate *scintilla* that remains in him, is regarded, by this court, as a portion of the estate. Consequently the plaintiff is entitled to take, by virtue of the second devise in the will, the surplus of the sum that was raised under the decree in *Mitchell v. Preston*.

[*368] *RANGER v. THE GREAT WESTERN RAILWAY
COMPANY.(a)

Practice.—Pleading.—Supplemental Bill. ●

1843: 3d January.

After a cause had proceeded so far that the bill could not be amended, the plaintiff, without the leave of the court, filed a supplemental bill stating facts, all of which existed before the original bill was filed; but which, he alleged, he had only recently discovered. The statements and prayer of the supplemental bill, were in accordance with the statements and prayer of the original bill. An objection made at the hearing, that the supplemental bill had been irregularly filed, was overruled.

If a supplemental bill is irregularly filed, the defendant ought either to demur to it or to move that it may be taken off the file.

THE plaintiff in this suit had executed some extensive works in the formation of part of the Great Western Railway, between Bath and Bristol, parts of which were the subject of contracts between the parties; but a small part had been executed without any contract. Under the contracts, the plaintiff was entitled to receive a payment every fortnight, on account of the work done by him during the preceding fourteen days, which works were

(a) The reporter is indebted to his friend, Mr. Twells, for the above report.

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to be measured and certified by the engineer of the company, and payments had been made to him in this manner, on account of all the works, whether included in the contracts or not. The company afterwards declared themselves dissatisfied with the proceedings of the plaintiff, and took possession of the works and of all the plaintiff's plant and materials which were upon the works.

The plaintiff, by this suit, insisted that these proceedings of the company were irregular, and claimed to be paid for the plant, &c., which the company had seized, together with a large sum of money for the work which he had performed. The bill charged that the sums allowed by the different certificates were deficient, *but did not state the particular [*369] items in which such alleged deficiency was to be found.

The original bill was filed in July, 1838, and was several times amended, the last amendment being made in May, 1839. The answer was put in in November, 1839, and the time within which an order to amend could have been obtained after the answer was put in, under the 13th order of 1828, expired on the 16th of March, 1840.

On the 5th of March, 1840, a supplemental bill was filed.

On the 28th of March, 1840, an order was made for the defendants to produce certain documents, and the plaintiff was thereby allowed till the last day of the next Trinity Term, to file his replication, he thereby undertaking not to amend the bill.

The replication to the original bill was filed on the 16th of June, 1840, and to the supplemental bill on the 9th of January, 1841.

On the 14th of September, 1841, the plaintiff filed a second supplemental bill, stating that upon an examination of the certificates, he had for the first time discovered that the engineers of

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the company had been in the habit of describing and allowing for masonry work of a very expensive description, as work of a very ordinary character, and that he was entitled to many thousand pounds more than the certificates allowed him, on account of this masonry work. It then stated the particular mode of working the various descriptions of masonry, and set out [*370] numerous letters and also orders, *both written and verbal, to show that masonry of the most expensive kind had been required and approved of by the agents of the company, and prayed for a proper remuneration for these works. None of the circumstances were subsequent to the filing of the original bill; but the plaintiff stated he was not aware of the under payment till he examined the certificates, which he had never seen till they were brought into court in the first suit.

On the 3d of December, 1841, the plaintiff being desirous of proceeding with the examination of his witnesses, and the defendants wishing for further time to answer the second supplemental bill, an agreement was signed by the solicitors of both parties, that further time should be given to the defendants to put in their answer, and that the evidence taken in the original and first supplemental causes might be read in the three causes, or any of them.

The three causes now came on to be heard, and an objection was raised to the second supplemental bill, on two grounds: first, that it was irregular to file that bill, unless the leave of the court had been previously obtained upon a special application; and secondly, that if it were not irregular under the general practice of the court, still that as all the allegations in it could have been introduced into the original bill, it was a violation of the undertaking not to amend, and that as the plaintiff was thereby precluded from making these statements by amendment, he filed this second supplemental bill to evade his undertaking.

The *Solicitor-General*, Mr. *Stuart* and Mr. *Stevens*, in support of the objection:—Under the 13th order, the plaintiff [*371] might have applied *to the court for leave to amend;

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in that case he would have been met by his undertaking not to amend, and his application must have been refused. That order was made to prevent expense and delay; but if a party who is refused leave to amend, can immediately file a supplemental bill, not to introduce new matter, but to state facts, all of which existed before the original bill was filed, the object of the order is altogether frustrated. In *Colclough v. Evans*(a) a demurrer to a supplemental bill was allowed. *Crompton v. Wombwell*,(b) *The Attorney-General v. The Fishmongers' Company*.(c) The defendants objected by their answer to the irregularity of this bill, and therefore they are entitled to the same benefit as if they had applied to have it taken off the file. *Wray v. Hutchinson*,(d) *Milligan v. Mitchell*.(e) By the agreement of December, 1841, the defendants did not waive this objection; all they did was to consent that the evidence might be proceeded with before the answer to the second supplemental bill was put in, and that no technical objection should be taken to the reading of the evidence in that suit, merely because it was given before issue was joined in the cause.

Sir *Thomas Wilde*, Mr. *Wakefield* and Mr. *Twells* appeared for the plaintiff; but the Vice-Chancellor, without hearing them, gave judgment as follows:

THE VICE-CHANCELLOR:—I shall not trouble the counsel for the plaintiff, because it appears to me to be really a plain matter. In the first place, in *Wray v. Hutchinson*, what was attempted *to be done was this, to put in issue, by way of [*372] supporting the original cause, facts which had happened after the original bill was filed; and I apprehend that, unless the defendant has so conducted himself as to deprive himself of making the objection, it fairly may be made. The plaintiff is not at liberty at the hearing to give evidence of any facts, except those which happened prior to the filing of the original bill. Now this is a very different case. In that case, the objection was made by the

(a) *Ante*, Vol. IV, p. 76.

(d) 2 Myl. & Keen, 235.

(b) *Ibid*, p. 628.

(e) 1 Myl. & Cr. 433.

(c) 4 Myl. & Cr. 1.

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answer, and, being made, the Master of the Rolls sustained it, and, I think, quite rightly.

Now, observe what this case is. It is attempted, as I understand, by the plaintiff, to put in issue, by his second supplemental bill, facts which have happened before the original bill was filed. He did, by the production of the books in the course of the original cause, discover certain evidence which went to corroborate the general case which he might have against the company, upon facts existing before the original bill was filed. If the original bill should turn out not to have put these facts in issue at all, that would be a different kind of thing; that would apply to the hearing of the evidence; but the question now before me is, whether I am, at the hearing, at once to say that the supplemental bill ought to be treated as a nullity.

Now, I apprehend that if the supplemental bill was filed at a time when, by the course of the court, according to the true construction of the orders and the habit of dealing with them, it ought not to have been filed, the course for the defendants to take was, if the objection appeared on the face of the bill, to have made the objection by demurrer, and if the objection did not *arise on the face of the bill, I think they [*373] ought to have applied to the court to have that supplemental bill taken off the file. Now they do not demur. I do not know whether they could demur or not. In fact, they do not demur, nor do they make an application to take the bill off the file; and I myself never knew that the court, when the cause has been allowed to come on to hearing on a supplemental bill, would refuse to entertain that supplemental bill, which only seeks to give in evidence facts which existed antecedently to the filing of the original bill.

But it was said, because we might have made an objection to the supplemental bill at a given time and in a given manner, therefore, we shall now be at liberty to make it at the hearing. I think the objection to that would be, that there might be a complete answer given to the very objection, if the objection had

1843.—*Ranger v. The Great Western Railway Company.*

been made in the shape of a motion to take the bill off the file, because in that case it would have been competent to the plaintiff to have shown conduct on the part of the defendants, which would have prevented them from taking the objection: instead of which, they wait till the hearing, when it is impossible for the plaintiff to read any affidavits in support of his case, and then for the first time they make the objection. I think the making it in the answer is perfectly immaterial. They do answer, and they make the objection, but I apprehend it is not the proper mode of making the objection; and, therefore, my opinion is, irrespectively of this paper of the 3d of December, 1841, and what has taken place in the cause, that I am at liberty to attend to the statement of these facts, which are contained in the second supplemental bill.

In *Milligan v. Mitchell*, there was a special order given for leave to amend, by adding parties, and under *cover [*374] of that, the plaintiffs filed a bill and stated a new case. When the court knew, by its own orders, that the plaintiffs were in effect playing falsely with the court, and that, under pretext of an order which only gave leave to amend by adding parties, they were making a new case, the court would, on being informed of that, treat it as a nullity. It appears to me that this is quite a different case. I never recollect this sort of objection brought forward at the hearing. *Wray v. Hutchinson* is quite a different case, because the court cannot hear evidence, except of facts which are put in issue by the original bill, that is, the facts which happen antecedently to the original bill. I entirely approve of *Wray v. Hutchinson*, and with that approval I mean to say that I am now at liberty to hear the second supplemental bill.(a)

(a) See *Walford v. Pemberton*, *post*.

1843.—The Earl of Verulam v. Bathurst.

THE EARL OF VERULAM v. BATHURST.

Will.—Construction.

1843: 9th March.

Testatrix bequeathed a leasehold house and 3,000*l.* stock to trustees, in trust to permit her daughter to receive the rents and interest for life, for her separate use; and, from and immediately after her daughter's decease, she gave the rents and interest to the heirs of the body of her daughter lawfully begotten; but, in case her daughter should happen to die without leaving any lawful issue living at the time of her decease, she gave the house and the stock over. Held, that the daughter took the property absolutely.

SELINA, Dowager Lady Ranelagh, made her will, dated the 20th of August, 1780, in the following words:

"I give, devise and bequeath all that my leasehold messuage, tenement or dwelling-house, and premises thereunto belonging, situate in Grosvenor street, in the city of Westminster, now in my own possession, for all the estate and term of years I have therein, and all my household goods, household stuff [*375] and furniture belonging thereto *(except plate and jewels) as shall happen to be therein at the time of my decease, and also all my household goods and furniture belonging unto me at Englefield Green aforesaid, at the time of my decease, (except plate and jewels as aforesaid,) and also all my estate and interest in the several leasehold estates at West Dean and Grinstead, in the county of Wilts, which I have granted to my brother, Peter Bathurst, of Clarendon Park, in the said county of Wilts, Esquire, or any other person I shall or may grant the same, in trust for me by virtue of the powers under the will of my late dear husband, Lord Ranelagh, together with the sum of 3,000*l.* part of the sum of 5,000*l.* bank stock which I am now entitled to, unto my said brother, Peter Bathurst, and John Eyre of Langford, in the county of Wilts, Esquire, their executors, administrators and assigns, in trust to permit and suffer my dear daughter, Selina Mary Hervey, to receive the rents and profits of all my said leasehold estates, and use of all my said household goods before mentioned, and interest of the said 3,000*l.* bank

stock, for and during the term of her natural life, without the intermeddling or control of her present husband: it being my desire that the rents of my said leasehold estates and interest of the said 3,000*l.* bank stock, shall be paid and applied to the separate use of my said daughter, and shall not be subject to the debts, control or engagements of her present or any future husband she may hereafter marry: and, *from and immediately after the decease of my said daughter*, then I give, devise and bequeath the rents, issues and profits of all my said leasehold estates, and interest of the said 3,000*l.* bank stock, and use of all my said household goods and furniture, unto and to the use of *the heirs of the body of my said daughter lawfully begotten*: but, in case my said daughter shall happen to depart this life *without *leaving any lawful issue living at the time of her* [*876] *decease*, then I give and bequeath all that my said leasehold messuage, tenement or dwelling-house and premises in Grosvenor street aforesaid, for all the residue of the terms of years therein then to come, together with all such household goods and furniture therein and usually enjoyed therewith at the time of such my daughter's decease, unto my dear sister, Lady Tracy, wife of the Right Honorable Lord Tracy, her executors, administrators and assigns, to be solely at her own disposal, and not subject to the debts or intermeddling of her said husband; and, *from and immediately after the decease of my said daughter without issue as aforesaid*, I give and bequeath all such household goods and furniture of every sort as shall be then remaining, being and belonging to Englefield Green House aforesaid, unto my said brother, Peter Bathurst, his executors, administrators and assigns: and further, that, *in case of the death of my said daughter without issue as aforesaid*, then I give, devise and bequeath all and every my leasehold estates at West Dean and Grinstead aforesaid, and all my term and estates and interests therein, and also the said 3,000*l.*, bank stock and all interest and dividends thereon due, unto my nephew, Robert Bathurst, and nieces, Selina Louisa Harriet and Elizabeth Byam, daughters of my late sister, Louisa Byam, equally between them share and share alike, and to their respective executors and administrators.¹ The testatrix then gave several pecuniary legacies; and, lastly,

she bequeathed, to her daughter, Selina Mary Hervey, 2,000*l.* bank stock, part of the said sum of 5,000*l.* like stock, and all her plate, jewels and other personal estate not thereinbefore given, to enable her to pay the pecuniary legacies; and she appointed her daughter sole executrix of her will.

[*377] *The testatrix died in February, 1781, leaving her daughter named in her will, who was then the wife of Lionel Felton Hervey, her only child and next of kin her surviving. Mrs. Hervey had no child living at the testatrix's death; but she had three sons and two daughters born afterwards. Her eldest son died, in her lifetime, without issue. Her second son also died in her lifetime; but he left Sir Frederick Hutchison Hervey Bathurst, who was one of the defendants in the suit, his eldest son, heir at law and executor.

Lionel Felton Hervey died in 1785, and his widow married the plaintiff Sir William Henry Freemantle; but there was no issue of that marriage. Lady Freemantle died in November, 1841, having, by virtue of a power reserved to her by the settlement on her second marriage, made a will of which she appointed her husband and the other plaintiffs, the executors. The defendant Sir Frederick H. Hervey Bathurst was her heir at law.

The bill (which was confined to the 3,000*l.* bank stock, and the furniture in the testatrix's house in Grosvenor street and at Englefield Green) prayed for a declaration that, according to the true construction of the testatrix's will, Lady Freemantle became absolutely entitled to the stock and furniture.

Sir F. H. Hervey Bathurst, by his answer, said that he was advised that under the will, Lady Freemantle took a life interest only in the stock and furniture; and that, on her death, her heir at law, or such of her issue as then answered the description of heir or heirs of her body, became entitled thereto; and that he being at her death her heir at law, and also answering

[*378] the *description of heir of her body, was absolutely entitled to the stock and furniture; but if not, that they

became divisible either amongst the children of Lady Freemantle who were living at her death, and the personal representatives of such of them as were then dead, in which case he was entitled to one-fifth as representing his father; or amongst the issue of Lady Freemantle who were living at her death, in which case he was entitled to a proportionate share of the stock and furniture as one of her grandchildren.

The defendants Lady Knightley, the wife of the defendant Sir C. Knightley, Lionel Charles Hervey and Elizabeth Hervey, who were the only children of Lady Freemantle who survived her, insisted that the bank stock and furniture became divisible, on their mother's death, amongst her children who were *then* living; and Lionel Charles Hervey, who was the representative of his eldest brother, claimed one-fifth in his own right and one-fifth in his representative character, in the event of the property having become divisible, on his mother's death, amongst *all* her children.

Mr. *Bethell* and Mr. *E. G. White* for the plaintiffs:—A gift to A. for life, and, after his death, to the heirs of his body, gives A. an estate tail in realty and an absolute interest in personalty, unless (which there is not in this will) there is something in the context of the instrument that limits or controls the legal signification of the expression: "heirs of the body." The words: "but in case my said daughter shall happen to depart this life without leaving any lawful issue living at the time of her decease, then I give and bequeath, &c.," are merely words of executory gift; and, being such, they do not control the effect of the antecedent *words. *Denn v. Shenton*,^(a) [*379] *Wright v. Pearson*.^(b) In those cases it was held that an estate tail was created by the antecedent words, and that it was not affected by the subsequent executory gift. The only other words in this will which by any possibility can be said to affect the construction of the words in question, are: "and from and immediately after the decease of my said daughter without

(a) Cowp. 410.

(b) 1 Eden's Rep. 119.

 1843.—The Earl of Verulam v. Bathurst.

issue as aforesaid :” but those words are mere words of reference : they clearly refer to the prior executory gift, and can have no more effect on the words : “ heirs of the body of my said daughter,” than the words to which they refer have. The rule in *Shelley's Case*, is not derived from the feudal law, but is merely a rule of construction ; and there are only three cases (and the present is not one of them) in which the effect of a limitation to heirs of the body, admits of being controlled. Those cases are first, where words of superadded limitation are annexed to the words, “ heirs of the body ;” second, where words are added which are descriptive of a mode of enjoyment different from that which the words, “ heirs of the body,” would confer, if taken in their proper, legal signification ; and third, where it is manifest, from the context of the will, that those words are used, not in their original and proper sense, but with some secondary or peculiar meaning. In *Jesson v. Wright*,^(a) Lord Eldon said : “ The words, ‘ heirs of the body ’ will, indeed, yield to a clear, particular intent that the estate should be only for life ; and that may be from the effect of the superadded words, or any expressions showing the particular intent of the testator ; but that must be clearly intelligible and unequivocal.” And Lord [*380] **Redesdale* said : “ The rule is that technical words shall have their legal effect, unless, from subsequent inconsistent words, it is very clear that the testator meant otherwise.” But is there anything in the context of this will, to give to the words, “ heirs of the body,” an interpretation different from that which they technically bear ?

The argument for the plaintiffs was here discontinued, in consequence of the Vice-Chancellor's saying that he thought the case was with them, and that he wished to hear the counsel for the defendants.

Mr. *Walker* and Mr. *Romilly* for Sir Frederick H. Hervey Bathurst :—We contend that, taking the whole of the will together, Sir F. Bathurst, as being the person who filled the character

(c) 2 Bligh, 1 ; see pp. 53 and 57.

of heir of the body of Lady Freemantle at her death, is entitled to the absolute interest in this property.

Supposing that this has been a devise of a freehold estate, and the will had stopped at the words: "heirs of the body of my said daughter lawfully begotten," it would have been clear that Lady Freemantle would have taken an equitable estate for life, with a legal remainder over to the heirs of her body. For it is clear that the trustees take such an estate only as is commensurate with the purposes of their trust, which was a trust for the separate use of Lady Freemantle for her life; and, consequently, the legal estate was not required to remain and would not remain in the trustees, any longer than during her life.

Doe v. Nicholls(a) *where all the cases on the subject are [*881] collected. The bequest to the heirs of the body of Lady Freemantle, is a distinct, independent, legal bequest, and, as such, it does not coalesce with the prior, equitable life estate, but creates a contingent remainder in the heir of the body of the equitable tenant for life. In all the subsequent gifts, which, it is important to observe, are alternative or substitutional gifts, the leaseholds and other property are disposed of without any interposition of trustees.

Supposing, however, that the remainder to the heirs of the body of Lady Freemantle, was not an equitable but a legal remainder, then we contend that there is no inflexible rule of law which requires, with regard to personal estate, that the remainder to the heirs of the body, should coalesce with the previous estate for life, so as to give the absolute interest to the tenant for life. For the rule in *Shelley's Case*, though inflexible with respect to real estate, yields to the intention, to be collected from the whole of the will, when the property as to which the question arises, is personal estate. That rule has indeed been applied to personal estate in certain cases; but, in some of those cases, the subject of disposition was a mixed fund, composed partly of real and partly of personal estate, and an intention was manifested that both

(a) 1 Barn. & Cres. 336.

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properties should go together; and then the court has said: "We will give effect to the greater intention of the testator; and as we cannot give an estate tail in personalty, we will give the first taker an absolute interest." In other cases in which the rule has been applied, there has been a gift over on an indefinite failure of issue. Here, however, the property in dispute is unmixed personalty; and the limitation over is to take effect, not after an indefinite failure of Lady Freemantle's issue, but on [*382] failure *of issue at her decease. Besides, nothing more than an estate for life is given to her; and her husband was clearly intended to take nothing at all under the will. That intention, however, would be defeated by applying the rule in *Shelley's Case*; for then her husband would take the whole of the property; and, in addition to that, all the subsequent limitations would have no effect whatever.—[THE VICE-CHANCELLOR:—What is the sentence with which Lord Hardwicke concludes his judgment in *Garth v. Baldwin*?(a) "It is a limitation of personal estate to one for life and the heirs of his body, which vests absolutely whether so intended by the testator or not."]—Lord Hardwicke did not intend to lay down the proposition so broadly; for he had said, just before, that all the other cases had been upon particular distinctions of evidence of intention; and that, in *Hodgeson v. Bussey*(b) he held the adding the words, "executors, administrators, and assigns," strong evidence of intent to give a usufructuary interest for life, and to vest the property in the heirs of the body. In *Garth v. Baldwin*, also, the fund in dispute was a fund of realty and personalty combined, and there was no good executory limitation over. The intention, too, was that the property should go in succession, which, with regard to personal estate, could not be effected; and there was a limitation which was intended to take effect after an indefinite failure of issue. Consequently, that case is plainly distinguishable from the present. Here nothing like succession was contemplated. The subsequent gifts are substitutational for the first; and the property is virtually given over on the decease of Lady Freemantle.

(a) 2 Ves. 646.

(b) 2 Atk. 89.

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The testatrix, herself, has told us that, in her view,
 [*383] *the words, "heirs of the body" and, "issue," mean the same thing: and, if so, the case is within those in which the word, "issue" is used; and then it is quite clear that the issue will take after the death of the tenant for life.

There is an opinion, given by Mr. Fearn on a case, which is on all-fours with the present; except that the language of the will now before the court is more favorable to the construction which we are contending for.(a)

(a) Mr. Walker read the case and opinion to the court, from Fearn's Posthumous Works, p. 393. They were as follows:

Case.

A. B., possessed of an estate for the residue of a long term of years, says, in his will: "I give unto my cousin C. my leasehold estate during his life; and, after his decease, I give the same to the heirs of his body for the residue of the term that shall be then to come; and, for want of such issue, I give the same, after the decease of the said C., unto D. E. and her heirs, for the residue of the term." C. entered on the estate, had four sons, and died. His eldest son died in the lifetime of C., leaving a son him surviving, who, after the death of C., took possession of the lands and assigned them to H. and his wife.

Opinion.

Though, in general, a limitation of a term to one for life, and afterwards to the heirs of his body, vests the whole in the first devisee, when that limitation is not attended with other expressions or circumstances to prevent such a construction; yet courts have generally attended to any expressions that might warrant the construing the limitation as distinct, and make the latter operate as words of purchase. See the cases of *Hodgeson v. Bussey*, (2 Atk. 89,) and *Read v. Snell*, (2 Atk. 642,) and other cases. Now, in the present case, the limitation, after the decease of C., to the heirs of his body, for the residue of the term that shall then be to come, and the limitation over in default of such issue to D. E., after his decease, appear to be sufficient for that purpose; the former giving a separate interest from that before given to the father, viz: the residue of the term after his decease, and, consequently, excluding the construction of that residue vesting in the father; and the latter importing that the interest limited to the heirs of his body, should not vest till his decease, and should then vest in such heir; or, in default of such, then in D. E.; see the opinion of Lord Macclesfield, and the Lords Commissioners, on the effect of similar words, in the case of *Paine v. Stratton*, cited by Lord Hardwicke, 2 Atk. 647. I am, therefore, of opinion, that the limitation to the heirs of the body of C., did not vest till his decease, and then vested in the person who was heir of his body, as the person described; for, though the words, "heirs of the body," in these cases, may, under particular circumstances manifesting such an intention, be construed as *descriptio per-*

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[*384] *The other authorities referred to, were the treatise on executory devises, by the same learned author, c. 4:

[*385] *and *Dafforne v. Goodman*, (a) *Peacock v. Spooner*, (b) *Ward v. Bradley*, (c) *Webb v. Webb*, (d) *Butterfield v. Butterfield*, (e) *Theebridge v. Kilburne*, (g) *Price v. Price*, (h) *Wright v. Atkyns*, (i) *Tot-hill v. Pitt*, (k) *Read v. Snell*, (l) *Lampley v. Blower*, (m) *Jacobs v. Amyatt*, (n) *Knight v. Ellis*, (o) *Trotter v. Oswald*, (p) *Ex parte Sterne*, (q) and *Stonor v. Curwen*. (r) And the learned counsel distinguished such of those cases as were against them from the present, on one or other of the following grounds, namely, either that the fund in dispute was a mixed fund, or the gift over was intended to take effect on an indefinite failure of issue, or the instrument on which the question arose was made in consideration of marriage, and therefore the construction of it was governed by a principle which was not applicable to the case before the court.

Mr. *Macpherson* and Mr. *Hall*, for Sir C. and Lady Knightley,

sona, applicable to an heir apparent, or to children, though not answering the complete description of heir; yet I have not met with any instance of that sort, where there has been no expression or circumstance in the will importing such an intention; here are none that I discover. On the contrary, the limitation over after his decease, in default of such issue, (that is, heirs of his body, to which he refers,) shows that he meant by "heirs of his body," a person or persons answering that description at the decease of C., which entirely excludes the construction that Lord Hardwicke seemed to countenance, in the case of *Theebridge v. Kilburne*, (2 Vez. 236,) that where, in these cases, the words "heirs of the body," are taken as words of purchase, it is not necessary that the issue should survive the first taker, so as, in strictness, to be heir; for here it was necessary; because the residue of the term was after his decease, to vest in D. E., for want of such heir; and, consequently, only to vest in an heir surviving him, that is, an heir of his body in strictness.

I am, therefore, of opinion that the residue of the term, on the decease of C., became vested in his grandson G., as heir of his body.

(a) 2 Verm. 362.

(b) Ibid. 43.

(c) Ibid. 22, 23.

(d) 1 P. W. 132.

(e) 1 Vez. 133.

(g) 2 Vez. 233.

(h) Ibid. 234, cited.

(i) 19 Ves. 299.

(k) 1 Madd. 264.

(l) 2 Atk. 642.

(m) 3 Atk. 396.

(n) 4 Bro. C. C. 542; and 1 Madd. 376, note; and 13 Ves. 479.

(o) 2 Bro. C. C. 570.

(p) 1 Cox, 317.

(q) 6 Ves. 156.

(r) *Ante*, Vol. V, p. 264.

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also contended that the words, "heirs of the body," must be taken as words of purchase, but must be so construed as to comprehend all the issue of Lady Freemantle as a class. They cited Fearne's Ex. Dev., p. 492, *Lampley v. Blower, Knight v. Ellis, Theebridge v. Kilburne, *Chandless v. Price,*(a) [*386] *Cross v. Cross,*(b) *Brouncher v. Bagot,*(c) and *Doe v. Edlin.*(d)

Mr. Toller, for the defendants Lionel C. Hervey and Elizabeth Hervey, cited *Roberts v. Dixwell,*(e) *Stonor v. Curwen,* and *Garth v. Baldwin.*

Mr. Little appeared for trustees in whose names the bank stock was standing.

THE VICE-CHANCELLOR:—The question to be decided appears to me, after the decisions in *Garth v. Baldwin* and *Theebridge v. Kilburne*, to be reasonably clear.

I admit that, if it were the case of a trust to be executed, and it were plainly directed that the first taker was to take for her separate use, and then there were words which directed that the property should be limited to the heirs of her body, the court could not execute that direction so as to give a complete estate tail to the first taker; because the very expression of separate use to the first taker for life, would imply that that first taker should not have the legal estate; and then, if there were no words to show that the heirs of the body were not to take the legal estate, it is perfectly manifest that the words, "heirs of the body," could never be taken as mere words of limitation, so as to give an estate tail to the first taker. But the case before me is not a case of that kind. For, in my opinion, the whole legal interest in the chattels real as well as in the chattels personal, vested, of necessity, in those persons who were named the trustees—that is, upon the supposition that the executrix assented to the legacy.

(a) 3 Ves. 99.

(b) *Ante*, Vol. VII, p. 201.

(c) 1 Mer. 271.

(d) 4 Adol. & Ell. 582.

(e) 1 Atk. 607.

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[*387] *If, however, counsel think that the question is involved in so much doubt that the opinion of a court of law ought to be taken on it, I am perfectly willing to send a case to a court of law. At the same time I must say that my opinion is very clear upon the point, that the whole legal interest in the leaseholds and in the personal chattels, vested in those persons who were named as trustees.

Then, for what purpose were they trustees? They were trustees in trust to permit Mrs. Hervey (afterwards Lady Freemantle) to take the rents and profits of the leasehold estates, and the dividends of the bank stock, and the use of all the household goods, &c., for her life, for her separate use; which is but a trust for her during her life, with this superadded modification, that the husband shall not interfere with the property during her life. Then the testatrix goes on to say: "And from and immediately after the decease of my said daughter, then I give and bequeath the rents, issues and profits of all my said leasehold estates and interest of the sum of 3,000*l.* bank stock, and the use of all my household goods and furniture, unto and to the use of the heirs of the body of my said daughter lawfully begotten;" which, in effect, is a trust for the heirs of the body of the daughter lawfully begotten. And it is observable that, here, the things which are expressed to be given in trust for the heirs of the body of the daughter, are the things which sustain the same description as those which the daughter was to have. There is no variation in the phrase; there is no introduction of the principal, as if it were contra-distinguished from the interest; on which distinction some of the cases turn. Then the will proceeds: "But, in case my said daughter shall happen to depart this life with-
[*388] out leaving any lawful issue living *at the time of her decease," then the property is to go over; on which nothing particular turns.

There is nothing in this will, which, of necessity, restrains the general import of the words, "heirs of the body." There is no mention of children.[1] If you look at the case of *Paine v. Strat-*

[1] Where the contract shows that by the words, "heirs of the body," is meant children, they will be so construed. *Lymers v. Johnson*, 16 Sim. R. 270.

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son(a) which is referred to in *Bead v. Shell*, you will see that, though there was a devise to the testator's sister Anne Paine, and the heirs of her body lawfully begotten, the devise over for want of such issue or heirs, was to the children of the testator's sister Mary Stratton, equally among them and their heirs and assigns forever: and, if you look at the will, as stated at length in 3 Bro. P. C. 257, you will find that the words used were: "sons and daughters equally." So that there can be no question about that case.

Here there are no words of limitation superadded; and, in my opinion, the words: "in case my said daughter shall happen to depart this life without leaving any lawful issue living at the time of her decease," are tantamount to this, that if there should be no heirs of her body living at the time of her decease, then the property should go over. So that, in the first instance, if she happened to have issue living at her death, it would be an absolute interest in her; but in case she had no issue, that is, no heirs of her body living at her death, the limitation over would be good.

Then I find the cases of *Garth v. Baldwin* and *Theebridge v. Kilburne* going very nearly on all-fours with this case. In the case of *Theebridge v. Kilburne*, the trust was, after the death of the settler and his wife, to *pay the whole [*389] profits of the property to his daughter, Sarah, during her life, and, immediately from and after her decease, to the heirs of the body of Sarah lawfully begotten, if the term should so long endure; and, for default of such issue, then to his grand-daughter, her executors, administrators and assigns: and Lord Hardwicke held, in that case, that the first taker took the whole interest. In *Garth v. Baldwin*, the trust was to pay the rents and profits of the testator's real and personal estate to Sarah Garth for her separate use for life, and, after her decease, to pay the same to her son Edward Turner Garth, for life, and afterwards, to pay the same to the heirs of his body; and, for want of such issue, to pay the same to all and every other son or sons

(a) 3 Atk. 647, cited.

 1843.—Stone v. Greening.

of the body of Sarah Garth begotten or to be begotten, and the heirs of their bodies successively, the eldest to be preferred in priority of birth; and, for want of such issue, in trust to convey to the persons named. There it was held that Edward Turner Garth was to take absolutely.

It would be endless to compare the words of this will, with the words in all the other cases; but I rest my opinion on this, that, in all the other cases that have been mentioned (I believe in all of them) it will be found that there are words which discriminate them from this case. Here there is no reference to children; there is no reference to sons or daughters; there is no gift of the property to the heirs of the body, by a description different from that by which it is given, in the first instance, for life: and, therefore, my opinion is (and I do not think that anything will be gained by a further consideration of the case, because all the cases have been produced and discussed [*390] very ably) that the *personal representatives of Lady Freemantle, that is, the plaintiffs, are absolutely entitled.

Declare that, under and by virtue of the will of the testatrix, Lady Ranelagh, Lady Freemantle became absolutely entitled to the sum of 3,000*l.* bank stock, and the furniture in the testatrix's houses in Grosvenor street and Englefield Green, and that the same now belong to the plaintiffs.

STONE v. GREENING.

Will.—Construction.

1843: 10th March.

Testator devised all his real estates to trustees; as to his *freehold* messuage, farm, lands and hereditaments in the county of B., in trust for C. The testator had a farm in that county, consisting of a messuage and 116 acres of land, of which the messuage and the greater part of the land were freehold, and the other parts leasehold for long terms of years at peppercorn rents; and they were interspersed with and undistinguishable from the freehold part, and had been demised therewith as

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one farm, at one entire rent and the testator had always treated and dealt with them as freehold. Held, nevertheless, that the leasehold parts were not comprised in the trust.

CHARLES STONE, by his will, dated the 17th of May, 1839, devised all his real estates, and all his leasehold estates, lands and tenements, and all his goods, chattels, personal estate and effects to trustees, in trust, as to *his freehold messuage, farm, lands and hereditaments situate in the county of Buckingham*, his freehold land at Felstead in Essex, and his freehold messuages situate in Map street, Sale street and Brick lane, Bethnal Green, in trust to receive the rents thereof, and to apply them for the benefit of the plaintiffs in the manner therein mentioned. He then directed his trustees to sell his *freehold* messuage in Spitalfields, immediately after his decease, and to stand possessed of the proceeds, and also of his personal estate, in trust, thereout, to pay his debts and legacies; and, as to the residue thereof, *and [*391] all the rest, residue and remainder of all his real and personal estate, of what nature or kind the same should be, in trust for his children therein named.

The testator died in July, 1841. At the date of his will and at his death he was seised and possessed of a messuage, farm and lands at Mursley, in Bucks, containing 116 acres. The messuage and ninety-three acres three roods and twenty-one perches of the land, were freehold, and the remaining twenty-two acres and nineteen perches, were leasehold; part being held for the remainder of a term of 1,000 years, another part for the remainder of a term of 500 years, and the rest, for the remainder of a term of 999 years, at peppercorn rents. The term of 1,000 years commenced in the 9th year of Queen Elizabeth; but the commencement of the other terms was unknown, the instruments creating them having been lost; and the only title deeds relating to them in the testator's possession, being assignments, the latest of which was the assignment to the testator, dated in September, 1816.

By an indenture dated the 16th of November, 1837, the testator let the farm to a tenant, for fourteen years, at an entire rent of 150*l.* per annum: and the rent and right of re-entry were re-

1843.—*Stone v. Greening*.

served to, and the covenants were made with him, *his heirs and assigns*.

A witness, who had been the receiver of the rents of the testator's estate at Mursley, for twenty years prior to the testator's death, deposed that, on the 16th of November, 1837, (the date of the lease,) the 116 acres were thrown together and held and occupied as one entire farm, and that there was not any distinction, to the eye, between the freehold and the leasehold parts [*392] *which were interspersed and intermingled with each other, so that it was not possible to distinguish the one from the other: that the testator, as far as the witness knew or believed, always treated, described and dealt with the 116 acres as being, altogether, freehold: that, in addition to the farm, the testator, at the date of his will and at his death, was seised of a freehold cottage, garden and part of a close at Mursley, let, on lives, at 10*l.* a year; and that, in 1838, he purchased two freehold and three leasehold cottages there.

The cause was heard as a short cause; and the question was whether the words: "my freehold messuage, farm, lands and hereditaments situate in the county of Buckingham," comprised, as the bill alleged, the leasehold as well as the freehold part of the testator's farm at Mursley.

Mr. Wakefield and Mr. Chandless for the plaintiffs, cited *Thompson v. Lawley*,^(a) *Hobson v. Blackburn*,^(b) *Day v. Trig*,^(c) and *Lane v. Stanhope*.^(d)

Mr. Bethell and Mr. Simons, and Mr. Cooper and Mr. Rudall appeared for the *cestui que trusts* of the testator's residuary personal estate, and

Mr. Wright and Mr. Hoare for the trustees of the will. But,

The VICE-CHANCELLOR, after hearing the counsel for the

(a) 2 Bos. & Pull. 303.

(c) 1 P. W. 286.

(b) 1 Myl. & Keene, 571.

(d) 6 T. R. 345.

1843.—Griffith v. Pownall.

plaintiffs, said that, as the testator had property in the county of Buckingham, to which the words: "my freehold messuage, farm, lands and hereditaments" *were correctly [*393] applicable, he must hold that the leasehold part of the farm was not comprised in those words, but passed by the residuary bequest in the will.(a)

(a) See *Arkell v. Fletcher*, ante, Vol. X, p. 299; and *Parker v. Marchant*, 5 Mann. & Grang. 498, and 2 Youn. & Coll. N. C. 279.

GRIFFITH v. POWNALL.

Appointment.—Perpetuity.—Remoteness.

1843: 11th March.

A. had power to appoint a fund amongst all the children of B., *begotten and to be begotten, and their issue*, and, in default of appointment, the fund was given to the children equally. B. had only six children, all of whom were living when the power was created. A. directed by his will that *the share* which every child of B. *begotten or to be begotten*, was entitled to in default of appointment, should be held in trust for that child for life, and, after its death, *for its children*. Held, that the appointment was not void for remoteness.

'UNDER an indenture dated the 8th of November, 1790, the trustees of a sum of 10,000*l.* four per cent. stock, were to pay the dividends to Elizabeth, the wife of James Pownall, for her separate use for life, and, after her death, the dividends of one moiety to James Pownall for life, and, after the death of the survivor of them, the trustees were to transfer that moiety unto all or any one or more of the children of Mr. and Mrs. Pownall begotten or to be begotten, or unto all or any one or more of such children, and all or any of the issue of all or any of such child or children, at such time or times, in such shares, &c., as Edward Hill should, by deed or will, appoint; and, in default of appointment, the trustees were to transfer such moiety to all the children of Mr. and Mrs. Pownall begotten and to be begotten, equally; and, after Mrs. Pownall's death, they were to transfer the other moiety in like manner.

 1843.—Griffith v. Pownall.

Mr. and Mrs. Pownall had four sons and two daughters **living at the date of the indenture*; and they never had another child.

Edward Hill, by his will dated the 24th of January, 1800, after reciting the indenture of November, 1790, and that there were six children of Mr. and Mrs. Pownall then living, (whose names he mentioned,) appointed that the shares of the 10,000*l.* stock, which such of the children of Mr. and Mrs. Pownall, *begotten or to be begotten, as were or should be daughters*, would be entitled to in default of appointment, should remain vested in the trustees, upon trust, as to one moiety thereof after the decease of Mrs. Pownall, and, as to the other moiety, after the decease of her and her husband, to pay the dividends to such of the said daughter and daughters as should have attained twenty-one or be married, for their separate use for life, according to their respective shares of the capital; and that, after their deaths, the trustees should transfer *their shares* of the capital unto and equally between and among all *their children* respectively.

One question in the cause was whether the appointment to *the children* of the daughters of Mr. and Mrs. Pownall *begotten or to be begotten*, was not void for remoteness. That question was argued by the counsel for the children of Mrs. Fourdrinier, (who was one of Mr. and Mrs. Pownall's children,) and by the counsel for Mrs. Fourdrinier.

Mr. Walker and Mr. James Parker for the children, said that, so far as their clients were concerned, the appointment was not too remote; for their mother was living at the date of the deed creating the power, and, therefore, the appointment [*395] would have been valid, if it had been *inserted in that deed. *Rouledge v. Dorril*(a) and *Arnold v. Congreve*.(b) In the latter case, a testatrix having bequeathed a sum of stock to her son for life, and, at his death, one-half of it to his eldest son *living at her death*, and the other half to his other children;

(a) 2 Ves. jun. 357.

(b) 1 Russ. & Myl. 209.

and having bequeathed another sum of stock to her two daughters, for their lives, and, after their deaths, to their children, directed, by a codicil, that the shares of her grandchildren should be settled on them for their lives, and afterwards revert to their children : and Sir John Leach, M. R., held that one-half of the fund being given to the eldest son of the testatrix's son living at her death, a life interest might be well limited to him, with remainder to his unborn children ; that the will gave that sum absolutely to such eldest son ; but that the codicil ought to be read *reddendo singula singulis* ; and that, as applied to that bequest, it amounted to a direction that the eldest son should enjoy the interest of one-half of the fund during his life, and that, at his death, the capital should go to his children ; and that those limitations were within the rule of law : but that the limitations to the children of the other grandchildren, were too remote ; for the other grandchildren were not required to be living at the testatrix's death.

Mr. Walker and Mr. Parker added that, in the present case also, the will ought to be read *reddendo singula singulis* ; and that there could be no doubt that the appointment would have been good so far as Mrs. Fourdrinier's children were concerned, if the testator had named their mother in the operative part of his will ; and that he had done so, in substance ; for, in the reciting *part, he had mentioned the names of the six chil- [*396] dren of Mr. and Mrs. Pownall who were living at the date of the deed creating the power ; and Mr. and Mrs. Pownall never had any other child.

Mr. Bloxam and Mr. F. J. Hall for Mrs. Fourdrinier, contended that the appointment was too remote, as it was made in favor of the children of the daughters of Mr. and Mrs. Pownall begotten and to be begotten, as constituting one entire class.

Mr. Purvis, Mr. Wood, Mr. Bagshawe, Mr. Willcock, Mr. Temple, Mr. Bacon, Mr. Toller and Mr. Cook, appeared for other parties to the suit.

THE VICE-CHANCELLOR:—The power was good in its crea-

1843.—Griffith v. Pownall.

tion ; for though some of the objects of it may have been beyond the limit which the law prescribes, it was a power of selection, and the donee might have selected such of the objects as were within the prescribed limit.

Upon the law applicable to the question that has been discussed in this case, there can be no doubt ; the matter to be considered is, what is the effect of the language which the testator has used.

I admit that if a person having a power over a fund, appoints it, in bulk, amongst a set of persons *collectively*, some of whom are within the rule of law as to perpetuity, but the rest of them are not, the appointment is void *in toto* : and, that being so, the question is whether the appointment which the testator in this case has made, is an appointment of that description. In order to determine that question, we must, as I said before, [*397] *have regard to the language which the testator has used.

He recites, first, the deed of November, 1790 ; next, that there were six children of Mr. and Mrs. Pownall then living, and he mentions their names : then, after reciting some other matters which it is not necessary to notice, he directs that *the share and shares* which such of the children of Mr. and Mrs. Pownall, begotten or to be begotten, as was, were or should be a daughter or daughters, would be entitled to, in default of any appointment to be made by or in pursuance of the power, of and in the 10,000*l.*, 4*l.* per cent. annuities, or the securities or funds whereupon the money to arise by the sale thereof should be invested, should remain invested in the names of the then existing trustees and the survivors and survivor of them, and the executors, &c., of such survivor, or other the trustees or trustee thereof for the time being, upon trust, as to one moiety thereof, from and after the decease of Mrs. Pownall, and, as to the other moiety thereof, from and after the decease of the survivor of her and her husband, to pay the dividends and yearly proceeds thereof into the proper hands of such of the said daughter and daughters respect-

1843.—Griffith v. Pownall.

ively as should have attained the age of twenty-one years or be married, for and during the term of the lives or life of such daughter or daughters respectively, according to her part or share, or their respective parts or shares of the same annuities or the securities or funds whereupon the same should be invested, to and for her and their own sole and separate use, exempt from the power, disposition, debts and engagements of any and every husband with whom she and they respectively might have intermarried or should intermarry; and, from and after the decease and respective deceases of such *daughter and [*398] daughters, upon further trust that the said trustees or trustee for the time being should transfer and pay *the share and shares of each and every of the said daughters* so dying, of and in the said 10,000*l.* 4*l.* per cent. annuities, or the securities or funds whereupon same should be invested, unto and equally between and amongst all the lawful children of such daughter or daughters respectively, equally to be divided between or amongst them (if more than one) share and share alike, and, if only one child, then to such only child, such children or child to take *per stirpes* and not *per capita*, and no children or child of one daughter, to take or be entitled to *the share or any part of the share of another daughter, but only the share and respective shares of his, her or their mother or respective mothers.*

The testator next provides for the survivorship and accruer of the shares of the children who should die under twenty-one and unmarried; and then directs, so far as the rules of law and equity will permit, that, in case any such daughter or daughters of Mr. and Mrs. Pownall shall die without having had any child, or having had such children or such only child, all such children or such only child shall die under twenty-one and unmarried, the trustees shall stand possessed of the share and shares of each such daughter not having had any such child, or whose children or only child shall so die, upon such trusts and for such intents and purposes as the same would have been subject to, under the deed of November, 1790, if he had not made any appointment by virtue of the power thereby reserved.

1843.—Stillwell v. Blair.

Now it is manifest, from the language which the testator has here used, that he does not appoint the bulk of the fund ; [*399] but merely directs how *the share of *each daughter* shall go after her death. If there had been a seventh or an eighth daughter, the appointment would have been bad as to their children. But, nevertheless, the appointment, as to Mrs. Fourdrinier's share, would have been good ; for the partial invalidity of the appointment with regard to the shares of her younger sisters, could not affect, in the slightest degree, the validity of the appointment of her share.

Declare that, under the will of Edward Hill, the testator in the pleadings named, the share of Harriot Fourdrinier, the wife of Sealy Fourdrinier, in the pleading respectively named, of and in the 10,000*l.* 4*l.* per cent. annuities mentioned in the indenture of the 8th of November, 1790, was well appointed in favor of her and her children.

STILLWELL v. BLAIR.

Practice.—Infant.—Guardian.

1843: 29th March.

Guardian *ad litem*, appointed to infants, under special circumstances, without a commission or their appearing in court.

In this suit there were twenty infant defendants, the children of the five daughters of the testator in the cause ; and four of them, who were the children of one of the daughters who was dead, were out of the jurisdiction. The four surviving daughters were the plaintiffs in the suit.

On two of the infants, who resided within twenty miles of London, appearing in court for the purpose of having a guardian *ad litem* assigned to them,

Mr. *Torriano* stated that the rest of the infants who were with-

1843.—Bond v. Roberts.

in the jurisdiction, resided in different counties, more than fifty miles distant from London; and, on *account [*400] of the expenses which would be occasioned by issuing commissions for the appointment of guardians to them, he applied to the court to appoint the person who was assigned as guardian to the two, guardian also to the others who were within the jurisdiction, their interests being identical; and that another person might be appointed guardian to the four who were out of the jurisdiction.

THE VICE-CHANCELLOR asked whether Mr. *Torriano* had an affidavit that the non-appearing infants who were within the jurisdiction were alive; and, on being answered in the affirmative, made the order.(a)

(a) See 1 Smith's Prac. 356 and 357, 3d edit.

BOND v. ROBERTS.(b)

Infant.—Contempt.

1843: 29th March.

A *habeas corpus* issued to bring up the body of a ward of court who had been taken in execution in an action by a tradesman, for necessities, and the tradesman was ordered to attend at the bar of the court at the same time.

A YOUNG gentleman, a ward of court, had been taken in execution in an action for the amount of a tradesman's bill for goods sold and delivered (which were considered to be necessities,) and was confined in Whitecross street prison.

The VICE-CHANCELLOR, on the application of Mr. *Wakefield*, ordered a *habeas corpus* to be issued to the sheriff of Middlesex to bring up the body of the ward, and the tradesman to attend at the bar of the court, at the same time.

(a) *Ex relations.*

1843.—Clarke v. Butler.

[*401]

*CLARKE v. BUTLER.(a)

Will.—Construction.

1843: 31st March.

Testator bequeathed his residue to trustees, in trust for J. F., for life, and, after her death, for her children: but in case J. F. should survive her mother, and die without having had lawful issue, then in trust for the brothers and sisters of J. C. But in case J. F. *should die in the lifetime of her mother without lawful issue*, then the testator directed the trustees to retain, out of the residue, sufficient to produce 150*l.* a year, and to pay the annual produce to the mother for life; and, after her decease, he gave *the principal so to be retained to the person or persons who would be entitled thereto in case J. F. had survived her mother and died without lawful issue*. J. F. died without issue in her mother's lifetime: Held, that the whole of the residue, except the fund for paying the annuity, was undisposed of

JOHN CLARKE, by his will dated the 31st of October, 1812, gave 6,000*l.* which he then had in the navy five per cents., to Caroline Jane Fountain, for her own absolute use and disposal: and, after giving several other legacies, he gave all his plate, linen, china ware, pictures, live and dead stock, and all the rest and residue of his goods, chattels and personal estate whatsoever and wheresoever and not thereinbefore by him disposed of, to Caroline Jane Fountain, to and for her own absolute use and disposal.

. The testator, by a codicil dated the 29th of March, 1813, revoked the bequest of the residue and of the 6,000*l.*, navy five per cents. to Caroline Jane Fountain, and, in lieu thereof, gave her 1,000*l.* sterling; and he gave the residue of his personal estate and the 6,000*l.* stock to his executors, in trust to invest such residue in the purchase of other stock, and to receive the dividends thereof and of the navy five per cents., and to pay the same to Caroline Jane Fountain for life; and, after her decease, in case she should have any lawful issue, to pay the principal of the 6,000*l.* stock, and the said other stock so to be purchased as aforesaid, to all and every the child and children of Caroline Jane Fountain, equally on their attaining twenty-one; and in

(a) 16 Sim. 288.

1843.—Clarke v. Butler.

case she should survive her mother, *Elizabeth Fountain*, and die *without having had lawful issue, then to assign [*402] the principal of the whole of the said stock to the brothers and sisters of his godson, *John Clarke*, who might be living at his decease: but in case *Caroline Jane Fountain* should happen to die in the lifetime of her mother without lawful issue, then he directed his trustees and executors to retain so much of the said stock as should be sufficient to produce an annual income of 150*l.* a year, and to pay over such annual produce to *Elizabeth Fountain* for life; and, after her decease, he gave the principal of the said stock to be retained by his trustees and executors for the purpose last aforesaid, to the person or persons who would be entitled thereto in case *Caroline Jane Fountain* had survived her mother and died without lawful issue.

The testator died in April, 1814. *Caroline Jane Fountain* died a spinster in April, 1830. *Elizabeth Fountain*, her mother, died in April, 1841.

The question was whether the brothers and sisters of the testator's godson, *John Clarke*, who were living at his decease, were entitled to the whole of the testator's property out of which the fund to answer the annuity of 150*l.* was directed to be retained, or to that fund only.

Mr. Bethell, *Mr. Anderdon*, *Mr. Lovat*, *Mr. Willcock*, *Mr. Calvert* and *Mr. Addis* for the brothers and sisters of the testator's godson, *John Clarke*, and parties who claimed under them; said that the question arose with respect to a residue, and that it was an invariable rule in construing a testamentary instrument, to prevent, if possible, an intestacy; and, with that view, the word "and," in the first gift over in the codicil, ought to be read, "or," so as to make that gift take effect in *the [*403] event of *Caroline Jane Fountain*, dying either in the lifetime of her mother, or without issue: that it was evident that the testator considered that the brothers and sisters of his godson, would be entitled to the whole of his residue under the first gift to them, and that his intention, in making the subsequent part

 1843.—*Clarke v. Butler.*

of his codicil, was to secure an annuity to Elizabeth Fountain, in case her daughter should die without issue in her lifetime; and it would be most unreasonable to say that he meant to interfere, in the slightest degree, with the ultimate disposition of his property which he had previously made, further than might be requisite to effectuate that intention. *East v. Cook*; (a) *Pearshall v. Simpson*; (b) *Mackinnon v. Sewell*. (c)

Mr. *Campbell* and Mr. *Cook* appeared for the testator's next of kin; but,

The VICE-CHANCELLOR, without hearing them, said:—My opinion is that the brothers and sisters of the testator's godson, John Clarke, are not entitled to the residue of the testator's estate; for, in the event which has happened, of Caroline Jane Fountain, dying in the lifetime of her mother, there is a total absence of gift in their favor.

In one event, namely, in case Caroline Jane Fountain should survive her mother and die without having had lawful issue, the testator gives the whole of the residue to the brothers and sisters of his godson: but, in the other event, that is, in case [*404] Caroline Jane Fountain should die *in the lifetime of her mother without issue, he gives them part of the property only, and is silent as to the remainder. The consequence is that the residue, after setting apart a sufficient part of it to provide for the payment of the annuity given to Elizabeth Fountain, is undisposed of, and the testator's next of kin are entitled to it.

(a) 2 Vez. 30.

(b) 15 Ves. 23.

(c) *Ante*, Vol. V, p. 78.

1843.—Vaughan v. Buck.

VAUGHAN v. BUCK.(a)

Husband and Wife.—Settlement.

1843: 22d April.

A married woman, having a life interest in a fund, was living with and was maintained by her husband, but out of her own income, and in a manner very inadequate to it; and he was in very embarrassed circumstances, and had no means of support except his wife's income. The court nevertheless refused to order a portion of it to be settled to her separate use.

THIS was a suit for the administration of a testator's estate.

A petition and a cross petition were presented in the suit; one by the defendant, William James Buck, praying that the income of the testator's residuary estate to which his wife was entitled for life, under the will of her former husband, (by whom she had children,) might be paid to the petitioner; and the other, by the defendant Mrs. Buck, praying that a portion of the income and of the arrears of it (which had been paid into court under the decree) might be settled to her separate use.

Mrs. Buck's petition was grounded on her husband's having ill treated her and maintained her in a manner very inadequate to her fortune; on his being greatly in debt, having no property of his own, and having had his household furniture lately sold under an execution; and on her belief that, if the income and arrears were paid to him, it would be wasted and she and her children left destitute.

*Mr. *Stuart* and Mr. *Rogers* for William James Buck. [*405]

Mr. *Bethell* and Mr. *Roll*, for Mrs. Buck, cited *Ball v. Montgomery*,(b) *Beresford v. Hobson*,(c) and *Jacobs v. Amyatt*.(d)

(a) *Ex relations.*

(b) 4 Bro. C. C. 339.

(c) 1 Madd. 362.

(d) *Ibid.* 376, note; 4 Bro. C. C. 542. For the judgment, see 13 Ves. 479, note.

1843.—Buckland v. Pocknell.

THE VICE-CHANCELLOR :—I have no right to interfere in this case, with the right of the husband to receive his wife's income. They are living together, and he is maintaining her as well as he can. Therefore, I shall dismiss her petition and make an order according to the prayer of her husband's petition.[1]

(a) The above case is reported, on appeal from the decrees at the hearing, in 1 Phillips' Rep. 75. Subsequently the husband deserted his wife and became bankrupt, having possessed himself of 2,000*l.* to which the wife was absolutely entitled. The Vice-Chancellor ordered two-thirds of the dividends to be paid to the wife, and one-third to the husband's assignees. *Vaughan v. Buck*, 1 Sim. N. S. 284.

[*406]

*BUCKLAND v. POCKNELL.

Vendor and Purchaser.—Lien.

1843: 26th April and 4th June.

A. agreed to sell an estate to B. for an annuity, and B. was to pay off a mortgage to which the estate was subject. Accordingly B. executed a deed, by which he granted the annuity to A. and covenanted to pay it; and, by a conveyance of even date, but executed after the annuity deed, after reciting the agreement and the annuity deed, A. and the mortgagee, in pursuance of the agreement, and *in consideration of the annuity having been so granted as aforesaid*, and of the payment of the mortgage money, conveyed the estate to B. The annuity afterwards became in arrear: Held, that A. had no lien on the estate for the annuity.

In March, 1833, Edward Sawyer, being seised in fee of an estate in Surrey, subject to a mortgage to Thomas Hammond, agreed to sell it to W. Pocknell, subject to the mortgage, in consideration of an annuity of 200*l.*, to be paid by Pocknell to E. Sawyer, for his life, and of an annuity of 92*l.*, to be paid, after Edward Sawyer's death, to his son, Joshua Sawyer, in case he should survive his father: and it was further agreed that Pocknell should pay off the mortgage.

The agreement was carried into effect by the following deeds.

By an indenture dated the 17th of July, 1833, and made be-

1843.—*Buckland v. Pocknell*.

tween Pocknell, of the first part, E. Sawyer, of the second part, and Joshua Sawyer of the third part, after reciting the agreement, and the payment, by Pocknell to E. Sawyer, of the first quarterly payment of the annuity of 200*l.*, which became due on Midsummer day then last; and that, by indentures of lease and release, the release bearing even date with and intended to be executed immediately after the execution of the indenture now in statement, and to be made between E. Sawyer, of the first part, Hammond, of the second part, Pocknell, of the third part, and H. J. Turner, of the fourth part, the estate would be conveyed and assured by Edward Sawyer and Hammond to Pocknell, *his heirs, appointees and assigns: it was [*407] witnessed that, in pursuance and part performance of the contract, and in consideration of the premises and of the conveyance of the estate to Pocknell, Pocknell granted to Edward Sawyer an annuity of 200*l.* for his life: and in further pursuance and performance of the contract, and for the considerations aforesaid, Pocknell granted an annuity of 92*l.* to Joshua Sawyer for his life, in the event of his surviving Edward Sawyer: and Pocknell, for himself, his heirs, executors and administrators, covenanted with Edward and Joshua Sawyer, and each of them, and their respective executors and administrators, to pay to Edward Sawyer, the annuity of 200*l.*, and to Joshua Sawyer, the annuity of 92*l.*, in the event before mentioned.

By indentures of lease and release, of the 16th and 17th of July, 1833, being the indentures referred to in the foregoing deed, after reciting the conveyance of the estate to E. Sawyer, dated in June, 1823, the mortgage of it to Hammond, and the agreement with Pocknell; and that Pocknell, in pursuance and performance of that agreement, had, by an indenture of even date, granted the annuities as before mentioned; and that Pocknell, being prepared to pay off the mortgage, had requested E. Sawyer and Hammond to convey the estate to the uses and upon the trusts thereafter expressed: It was witnessed that, in further pursuance and performance of the agreement, and in consideration of the premises and of the several annuities of 200*l.* and 92*l.* having been so granted by Pocknell as thereinbefore recited, and in con-

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sideration of the payment thereafter mentioned to be made by Pocknell to Hammond, in discharge of the mortgage; E. Sawyer and Hammond conveyed the estate to Pocknell and [*408] *to Turner, his trustee, in the usual manner to bar dower.

Edward Sawyer died some time before the 10th of June, 1840. On that day, Joshua Sawyer assigned his annuity to T. Buckland; and the annuity having afterwards become in arrear, the bill was filed by Buckland and Joshua Sawyer against Pocknell and two other persons named Brady and Perks, (who had acquired an interest in the estate through him,) claiming, in effect, to have a lien on the estate for the annuity, and seeking to have the arrears of it raised and paid out of the estate.

Brady and Perks put in a general demurrer for want of equity.

Mr. *Stuart* and Mr. *Chapman Barber*, in support of the demurrer, said that neither Joshua Sawyer nor any person claiming through or under him, could, by any possibility, have a lien on the estate; for he was not the vendor of it, nor had he ever any interest in it: that the grant of the annuities did not make them issuable out of, or charge them in any manner upon the estate, but was a mere personal contract, by Pocknell, to pay the annuities.—[The VICE-CHANCELLOR:—It is a covenant with Edward and Joshua Sawyer, to pay one annuity to one of them, and the other annuity to the other of them.]—Joshua Sawyer was not even a party to the conveyance to Pocknell. *Clarke v. Royle*.(a)

Mr. *Bethell* and Mr. *Bilton* in support of the bill:—The [*409] case of *Clarke v. Royle* is plainly distinguishable *from the present. The question there arose not with respect to the annuity, but with respect to the 3,000*l.* The payment of that sum was dependent on the happening of a contingent event, and, therefore, there could be no lien for it. If I sell my estate for a contingent payment, I am content to part with it, expecting

(a) *Ante*, Vol. III, p. 492.

1843.—*Buckland v. Pocknell*.

the happening of the contingency. The right to purchase money is, in general cases, immediate: an obligation which is to be created on the happening of a fortuitous event, cannot create any lien. There is another important distinction between this case and *Clarke v. Royle*. It appears, from the articles of agreement, that E. Sawyer contracted to sell the estate in consideration of the annuities; but, in *Clarke v. Royle*, the consideration was the covenants to pay the annuity and the 8,000*l.*; consequently, when the vendor had gotten the covenants, he had received the consideration. Although the conveyance to Pocknell recites that the estate was sold to him in consideration of the annuities, it does not mention that the annuities were secured in the manner in which they have been secured. Therefore, the conveyance annexes the annuities inseparably to the estate. When the purchaser agreed to pay the annuities, he did nothing more than contract to pay the purchase money by instalments. And if there is any weight in the objection that the annuity in respect of which the bill is filed, is payable, not to the vendor but to a third person, then a vendor could not transfer his lien. If I sell my estate for a sum of money to be paid to A. B., then A. B. will have a lien on the estate for the money. *Winter v. Lord Anson*:(a) *Tardiffe v. Scrughan*;(b) Sugden on Vendors, Vol. III, p. 197 *et seq.*

*Mr. Stuart, in reply, cited *Parrott v. Sweetland*,(c) and [*410] added that the decision in *Winter v. Lord Anson*, was appealed from to the House of Lords, but the parties afterwards came to a compromise.

THE VICE-CHANCELLOR:—I have read over all the cases which, I believe, relate to this matter, and I have considered very particularly the recitals and other contents of the two deeds; and my opinion is that the demurrer, for want of equity, must be allowed.

Lord Eldon, in the case of *Mackreth v. Symmons*,(d) went very particularly and minutely through all the cases which, I believe,

(a) 3 Russ. 488.

(b) 1 Bro. C. C. 423, cited.

(c) 3 Myl. & Keen, 655.

(d) 15 Ves. 349.

 1843.—*Buckland v. Pocknell*.

are to be found on the subject up to that time; and, after having cited all of them except *Hughes v. Kearney*, he concludes in this manner: "In the case of *Hughes v. Kearney*, Lord Redesdale states the doctrine: and the proposition is not merely that the vendor might have security, but that he relied upon it: and 'a note or bills are considered, not as a security, but as a mode of payment. From all these authorities the inference is, first, that, generally speaking, there is such a lien: secondly, that, in those general cases in which there would be the lien as between vendor and vendee, the vendor will have the lien against a third person who had notice that the money was not paid."

My Lord Eldon uses the expression that the lien is given for the purpose of supporting the truth and justice of the case.

[*411] *Where the consideration is to be money paid down, and the money, in fact, is not paid, but a conveyance is made as if it had been paid, and that is all; or, if there be, in addition to it, the giving merely a note or bond, still, in substance, the vendor has not that which in point of justice he ought to have; and therefore a court of equity considers the holder of the land by means of the conveyance, as a trustee of the money for the vendor, which is to be made good out of the land itself: because the land never would have been parted with, but for the sake of the money.[1]

Now, in this particular case the question is whether it does not appear, on the face of the deeds, that the party who contracted to sell the land, that is, Edward Sawyer, has got that which he contracted to have. Adverting to the mode in which the conveyances are made, my opinion is that it would be quite wrong, because it would be contrary to what appears to have been the agreement of the parties, to hold that, after the deeds were exe-

[1] If the vendor take a distinct security for the money, either of property or the responsibility of a third person, the lien is waived. But merely taking the note or bond of the vendee himself, without a surety, is no waiver of the lien. *Gilman v. Brown*, 1 Mason R. 191; *Williams v. Roberts*, 5 Ohio R. 40; *Fish v. Howland*, 1 Paige Ch. R. 20; *White v. Williams*, 1 Paige Ch. R. 502; *Garson v. Green*, 1 Jehn. Ch. R. 308; *Hallock v. Smith*, 3 Barb. S. C. R. 267; *Boos v. Ewing*, 17 Ohio R. 500.

1843.—*Buckland v. Pocknell*.

cuted, any lien remained for the annuities. As there was a separate instrument, which was executed first, which contained a distinct grant of the two annuities and covenants for payment of them; and as the conveyance was made expressly in consideration of that deed; and as it was part of the express stipulation that the mortgage money should be paid off, and, consequently, that the mortgagee should convey his legal estate to the purchaser, it would be quite inconsistent with the mode in which the parties have dealt, to say that there is still an ulterior, latent equity for the purpose of securing the annuity in a manner in which neither party ever thought that it was to be secured; and it is evident that they did not think that it was to be so secured, from their having taken a specific security for it.

*In the case of *Parrott v. Sweetland*, which came before me and Mr. Justice Bosanquet when we had the honor of being the Commissioners of the Great Seal, we affirmed the judgment of Sir John Leach, in a case where the course of the transaction showed that the party had got that for which he bargained. [*412]

I do not take any notice of the case of *Clarke v. Royle*. It was a case peculiar to itself. I mention it only because I see it stated in the report that I said: "It appears to me that Lord Eldon, in *Mackreth v. Symmons*, expressly overruled the decision in *Tardiffe v. Scrughan*." Now I think that if that were said, in those very terms, it was said too strongly; because it cannot be said that my Lord Eldon did overrule *Tardiffe v. Scrughan*; although I think that it may be fairly inferred, from the remarks that he made upon that case in his judgment in *Mackreth v. Symmons*, that he was not satisfied with the decision in all its parts. He shows, as it strikes me, an inclination to criticise it, and to escape from it if the circumstances of the case before him would allow him to do so. But I do not wish it to be understood to be my opinion that he overruled it point blank.

With regard to the case now before me, my opinion is, for the reasons that I have stated, that the demurrer for want of equity, must be allowed.

1843.—Flight v. Camac.

[*418]

*FLIGHT v. CAMAC.

Practice.—Pro Confesso.

1843: 28th April.

A defendant, against whom a subpoena was prayed when he should come within the jurisdiction, remained out of the jurisdiction at the hearing of the cause: Held, that the form of praying the subpoena, was no objection to the bill being taken *pro confesso* against him.

THIS was a foreclosure suit.

One of the defendants, the mortgagor, was out of the jurisdiction, and the bill prayed for a subpoena against him when he should come within the jurisdiction. The cause, however, came on to be heard before he came within the jurisdiction: and, on

Mr. *Stuart*, for the plaintiff, proposing to take the bill *pro confesso* against him, the Registrar expressed a doubt as to whether the bill could be taken *pro confesso* against the defendant, as the bill prayed for a subpoena against him when he should come within the jurisdiction.

The VICE-CHANCELLOR, however, ruled that the form of praying the subpoena was no objection, and made the order.(a)

Mr. *Wood*, Mr. *Parry*, Mr. *Pole* and Mr. *Borrett* were also counsel in the cause.

(a) See *ante*, p. 32.

1843.—Oakes v. Strachey.

*OAKES v. STRACHEY.

[*414]

Will.—Construction.—Specific Legacy.

1843: 28th April.

A testator having three and a half per cents, East India stock, Danish bonds, and other property, bequeathed to his wife, during her widowhood, the interest of all the money he had or might possess in the funds or other securities: "And I further bequeath, to my wife, the interest of any other property I do or may possess, to be enjoyed by her so long as she remains single." Held, that the testator's widow was entitled, as against the residuary legatees, to enjoy, *in specie*, every portion of her husband's property which came within the description of money in the funds or other securities, and, consequently, his three and a half per cents, East India stock and Danish bonds.

THOMAS ALEXANDER OAKES made his will dated the 15th of February, 1840, as follows: "After payment of my debts, I give and bequeath unto my wife, during her life or until she marry again, the *interest of all the money I have or may possess in the funds or other securities*. And, further, I bequeath to my wife, the interest of *any other property* I do or may possess, to be enjoyed by her so long as she remains single, for the maintenance of herself and the maintenance and education of our five children. On the death or marriage of my wife, I will that *all the interest of my property* be reserved for the maintenance and education of my before mentioned children, and that any surplus interest that may remain after paying for the maintenance and education of the children, be added to *the principal sum I may leave*. and reserved for the benefit of the said five children, until they shall, respectively, become of age; at which time I bequeath, &c." (The testator then gave 6,000*l.* to each of his three daughters.) "After deducting the above 18,000*l.* from *the principal sum from which the interest above disposed of is derived*, I bequeath to my eldest son three-fifths of the residue of my whole *property*, and to my youngest son, the remaining two-fifths of *my property*. In the event of my wife remaining single, *the whole of the interest of my property* will be at her disposal during her life, and, consequently, unless she marries again, the division of *my property above alluded to*, will not take place until after her de-

1843.—Oakes v. Strachey.

[*415] mise. *In the event of the death of any of the children, then the amount which the deceased child would have been entitled to, will be added to the principal and disposed of as above specified. Should my wife marry again, then the shares of *my property bequeathed as above* to my five children, are to be paid to them on their becoming respectively of age." The testator concluded the disposition of his property, by giving his wine, furniture, jewels and plate to his wife absolutely, and his books to his eldest son.

At the hearing of the cause for further directions, it appeared that the testator's property consisted, partly, of 2,100*l.* three and a half per cents., 8,000*l.* East India stock, thirty-one Danish bonds for sums amounting together to 8,800*l.*, three shares in the Madras Comprehensive Steam Company, and sums of rupees due to him from different persons.

The question was whether the widow was entitled to enjoy any part of the property *in specie*, or whether the whole of it ought not to be converted into three per cents., according to the usual course of the court.

Mr. Walker and Mr. Busk for the plaintiffs, the residuary legatees, said that the testator commenced his will by directing his debts to be paid, and that the subsequent bequests amounted to nothing more than a general disposition of all his property after payment of his debts: that he had used the words, "funds and securities," once only throughout his will; that, in all the subsequent sentences, he used either the term "property," or "principal sum," without even once alluding to funds or securities:

that he considered the word, "property," to include [*416] everything he possessed; and *his using the term, "principal sum," showed that what he had in view was a sum producing interest: that there was nothing in any part of the will except the concluding bequest, which tended to show that he had in view the enjoyment, *in specie*, of any portion of his property: that, in that bequest, he mentioned, specifically, the parts of his property which he meant his widow to enjoy in

 1843.—*Oakes v. Strachey*.

specie; and, therefore, it was but reasonable to conclude that, if he had intended her to enjoy his funds and securities in like manner, he would have mentioned what those funds and securities were: that the court ought not to deviate from its general practice on slight grounds; and that, taking the whole of the will together, there was not a sufficient indication of intention to warrant the court in departing from it, in the present case. *Mills v. Mills*, (a) *Alcock v. Slopers*, (b) *Benn v. Dixon*, (c) *Lichfield v. Barber*. (d)

Mr. *Bethell* and Mr. *Shadwell* appeared for the widow.

Mr. *Murray* for the daughters, and

Mr. *Chambers* for the executors of the testator.

The VICE-CHANCELLOR, after hearing the plaintiff's counsel, said:—The testator gives to his wife, as one thing, the interest of all the money he had or might possess in the funds or other securities. Then he says: "And further I bequeath to my wife the interest of any other property I do or may possess."

So that he makes a distinction *between his money in [*417] the funds or other securities, and his "other property."

If he did not mean to make any distinction between them, why did he use the words of gift more than once; why did he repeat them: why did he not give his wife at once the interest of all his property?

I am unable to distinguish this case from *Vaughan v. Buck*, which came before me about two years ago, and in which I held that the testator's widow was not entitled to the specific enjoyment of certain sums of stock and other articles of property particularly mentioned and bequeathed to her by her husband. The Lord Chancellor, however, differed from me and reversed my decree. (e)

(a) *Ante*, Vol. VII, p. 501.

(c) *Ante*, Vol. X, p. 636.

(b) 2 Myl. & Keen, 699.

(d) 2 Beav. 481.

(e) This case is now reported by Mr. Phillips, Vol. I, p. 75.

1843.—Parker v. Golding.

The difference between this case and the case of *Mills v. Mills*, is that, in this case, the testator gives to his wife, the interest of all his money in the funds or other securities, in one sentence; and then gives her the interest of his other property, in another sentence. Whereas, in *Mills v. Mills*, the income of the whole of the testator's property, was given in one sentence. I say the whole of his property, because, though the gift was apparently specific, it was, in reality, nothing more than a description of the whole of the testator's property by a long enumeration of the particulars of which it consisted.

My opinion is that, according to the true construction of the will in this case, the testator's widow is entitled to enjoy, *in specie*, every portion of the testator's property which comes within the description of money in the funds or other securities.

[*418] *Declare that the testator's three and a half per cents, East India stock and Danish bonds, ought to remain unsold, and that his widow is entitled to receive the dividends and interest of them so long as she remains single.

PARKER v. GOLDING.

Legacy.—Vesting.—Will.—Construction.

1843: 28th April and 1st May.

Testator directed his trustees to pay the interest of 2,500*l.* to his daughter for life, for her separate use, and, after her death, for the maintenance of all her children, until they should attain twenty-one, and then the principal to be equally divided amongst her said children; and, if his daughter should die without leaving a child, then that the principal should be divided amongst all his own children then living. The daughter had children, but they all died under twenty-one. Held, nevertheless, that the legacy vested in them.

JOHN BULLIVANT, by his will dated the 19th of December, 1832, directed William Parker and Alexander Davidson, who were the trustees and executors of his will: "To fund the sum of 600*l.*, and apply the interest thereof for the education and

1843.—Parker v. Golding.

maintenance of Sarah, the daughter of my late dear daughter, Sarah Laxton, until she shall attain the age of twenty-one years, and then to be entitled to the principal ; but, in the event of her death before she shall attain twenty-one, then the principal sum of 600*l.* to return to my estate, and be equally divided amongst all my dear children then living, in equal shares and proportions, and not subject to their respective husbands in any manner. I hereby authorize and direct the said William Parker and Alexander Davidson to collect, get in, receive and fund the sum of 2,500*l.*, and pay the interest thereof unto my dear daughter, Susannah Williams, for and during her life, to and for her own separate use and benefit, and not subject to the debts or control of her husband ; and, from and after her decease, to and for the education, maintenance and support of all her *chil- [*419] dren, until they shall attain the age of twenty-one years, and then the principal to be equally divided amongst her said children : and, if my dear daughter should depart this life without leaving any child or children, I hereby direct that the said principal sum shall be equally divided amongst all my dear children then living, and not subject to the debts or control of any husband : And I also hereby direct the said W. Parker and A. Davidson to lay out and fund the sum of 2,500*l.*, and pay the interest thereof unto my dear daughter, Elizabeth Golding, for and during her life, to and for her own separate use and benefit, and not subject to the debts or control of any husband ; and, *from and after her decease, to and for the education, maintenance and support of all her children until they shall attain the age of twenty-one years, and then the principal to be equally divided amongst her said children ;* and, if my dear daughter, Elizabeth, should depart this life without *leaving any child or children*, I hereby direct that the said principal sum shall be equally divided amongst all my said dear children then living, and not subject to the debts or control of any husband : And, as to all the rest, residue and remainder of my estate and effects, of what nature or kind soever and where-soever, I give and bequeath the same and every part thereof unto my dear children, Susannah, Elizabeth and William, in equal shares and proportions, and not subject to the debts or control of their husbands."

 1843.—*Parker v. Golding.*

The testator died in December, 1832. The trustees and executors invested 2,500*l.* in the purchase of 2,835*l.* three per cents., and paid the dividends to the testator's daughter Elizabeth, who was the wife of the defendant William Henry Golding, during her life. She died in June, 1835, having had two children, both of whom *died infants, the elder, in her lifetime, and the younger, in October, 1841. William Henry Golding, their father, was their administrator, and claimed to be entitled, as such, to the 2,835*l.* stock: and the defendants William Bullivant and Susannah, the wife of the defendant Samuel Williams the younger, who were the surviving children of the testator, also claimed to be entitled to the same sum.

The bill prayed the court to declare who was or were the person or persons entitled to the fund, and in what shares and proportions, according to the true construction of the will.

The defendants Williams and wife, by their answer, submitted that the fund was divisible between Susannah Williams and William Bullivant in equal moieties, or, if not, that Susannah Williams and William Bullivant were each of them entitled to one-third of the fund under the residuary bequest in the will.

Mr. *Wakefield* and Mr. *Metcalf* appeared for the plaintiffs, the executors and trustees.

Mr. *Spence* and Mr. *Tennant* for William Bullivant, and Mr. *Cooper* and Mr. *Faber* for Mr. and Mrs. Williams, said that the gift of the principal of the 2,500*l.*, was distinct from the gift of the interest; and that there was no gift of the principal to the children of Mrs. Golding until the period of division, which was their attaining twenty-one; and, as neither of them attained that age, the principal did not vest in either of them. *Batsford* [*421] *v. Kebbell*, (a) *Wadley v. North*, (b) *Sainsbury v. Read*, (c) *Skey v. Barnes* (d) and *Hanson v. Graham*. (e)

(a) 3 Ves. 363.

(b) Ibid. 364.

(c) 12 Ves. 75. See p. 78.

(d) 3 Mer. 335. See p. 342.

(e) 6 Ves. 239. See p. 249.

 1843.—*Author v. Author.*

Mr. *Bethell* and Mr. *Shapter* for the defendant *Golding*, relied on the interest of the legacy being given for the maintenance of the children, and on the gift over being to take effect in case *Elizabeth Golding* should die without leaving any child or children, and not in case she should die without leaving any child who should attain twenty-one: and they cited *Lister v. Bradley*.(a)

The VICE-CHANCELLOR was, at first, inclined to hold that the legacy was contingent on the children attaining twenty-one, on the ground that, though the gift of the interest of a legacy had the effect of vesting the principal, where there was a gift of the principal independent of the direction to pay it; yet it had not that effect where, as in the case before him, there was no gift of the principal except in the direction to divide it. His Honor, however, said that he would consider the case, and ultimately held that, according to the true construction of the will, the interest and the principal of the legacy in question, must be taken to be given together, and that the case fell within *Fonnereau v. Fonnereau*(b) and *Hoath v. Hoath*:(c) and he declared that Henry W. *Golding*, as the administrator of his children, was entitled to the legacy.

(a) 1 Hare, 10.

(b) 3 Atk. 645, and 1 Vez. 118.

(c) 2 Bro. C. C. 3. See 1 Roper on Legacies, (White's edit.,) p. 494 et seq.

 **AUTHER v. AUTHER*.(a)

[*422]

Legacy.—Will.—Construction.

1843: 1st and 2d May.

A legacy of 10,000*l.* consols, "now standing in my name," held, from the context of the will, not to be specific.

Legacy.

Testator bequeathed a general legacy of 10,000*l.* consols to A. B. There was no deficiency of assets, but, owing to the institution of a suit for the administration

(a) 16 Sim. 263.

 1843.—Author v. Author.

of the testator's estate, the legacy remained unsatisfied for several years after the testator's death, during which consols rose: Held, nevertheless, that A. B. was entitled to have the full amount of his legacy purchased and transferred to him.

BENJAMIN AUTHER, by his will dated the 15th February, 1827, disposed of his property in the following words:—"I hereby direct my executrix and executor hereinafter named, by and out of my *funded estate* or property, or such of my estate and property as shall, at the time of my decease, be funded, to pay and satisfy the sum of 2,000*l.* to my wife, Margaret Auther, as soon as conveniently may be after my decease; I give and bequeath, to my said wife, all my household furniture and effects, plate, jewels, linen and china, wine, beer and other liquors, to and for her own sole and absolute use and benefit. All the rest, residue and remainder of my real and personal estate, effects and property whatsoever and wheresoever, I give, devise and bequeath unto my said wife, and my friend, the Rev. Joseph Dutton, upon the trusts and to and for the ends, intents and purposes hereinafter mentioned, expressed and declared of and concerning the same; that is to say, upon trust to collect, get in and receive all debts and sum and sums of money which shall be due, owing or belonging to me at the time of my decease, and not vested in or secured upon government or real security, and to do all such acts as may be necessary for vesting in them, my said trustees, all moneys due, owing or belonging to me at the time of my decease, which shall or may be then invested upon government or real security; and when, and from time to [*423] time so soon as such debt or debts, *sum or sums of money first mentioned, shall be got in and received, to lay out and invest the same, or so much and such part thereof as shall not be otherwise required for the purposes of this my will, upon government or real security, in the names or name of them my said trustees above named. And further, that they, my said trustees for the time being of this my will, do and shall, by and out of the moneys so as aforesaid or otherwise to come to their, his or her hands or hand, in the first place, fully pay and satisfy all my just debts, funeral and testamentary expenses and the expenses they respectively may be put to or occasioned

1843.—*Author v. Author.*

in the execution of this my will; and, after full payment and satisfaction thereof, and, as to my estate and property *unfunded*, if that shall be sufficient, and if not, then, as to my general personal estate, subject thereto; (a) and, as to my funded estate and property, subject to the aforesaid sum of 2,000*l.* sterling, then, upon further trust, that the said trustees do and shall stand and be seised and possessed of and interested in the rest, residue and remainder of my said estate, effects and property, both real and personal, upon trust to pay, to my said wife, the rents, interest, dividends, proceeds and profits of all such rest, residue and remainder of my said estate, effects and property (*except the sum of 10,000*l.* consols hereinafter mentioned*, and the interest, dividends, proceeds and profits of the said 10,000*l.* consols, subject only to the disposition of the same hereinafter contained,) for and during the natural life of my said wife.

“And upon further trust to pay and apply the interest, dividends, profits and proceeds of the sum of 10,000*l.* consols, *now standing in my name* in the books *of the governor and company of the Bank of England, for and towards the maintenance, education and support of my adopted nephew, Joseph Duncan Cork, for and during the natural life of my said wife; and, after the decease of my said wife, in case the said Joseph Duncan Cork shall not then have attained the age of twenty-one years, then to pay and apply such interest, dividends, profits and proceeds to and for the purposes aforesaid until he shall attain such age; and, from and immediately after the decease of my said wife, in case the said Joseph Duncan Cork shall then have attained his aforesaid age of twenty-one years, and if not, then and when so soon as he shall attain that age, to pay, apply and transfer, unto the said Joseph Duncan Cork, the said principal sum of 10,000*l.* consols, to and for his own absolute use and benefit: and I do direct and empower my said wife and the said Joseph Doughton, in case the said Joseph Duncan Cork shall not conduct himself with propriety and to the joint satisfaction of my said wife and the said Joseph Doughton, in the stead

(a) *Sic* in brief and copy will.

1843.—Author v. Author.

and lieu of the interest of the said principal sum of 10,000*l.* consols, to pay and apply for and towards the maintenance and education and support of the said Joseph Duncan Cork, the sum of one guinea weekly and every week until the decease of my said wife or his attaining the aforesaid age of twenty-one years, which shall last happen.

“And upon further trust that the said trustees for the time being of this my will, shall and do, from and immediately after the decease of my said wife, stand and be possessed of, and interested in, the further sum of 10,000*l.* consols, *now standing and being in my name*, in the books of the governor and company of the Bank of England, upon trust to pay and apply the interest, dividends, proceeds and profits thereof, to and for the use and benefit of the said Joseph Duncan Cork or his assigns,
[*425] *for and during the term of his natural life; and, *from and immediately after his decease, upon trust to pay and divide the said principal sum of 10,000*l.* consols, or the stocks, funds and securities wherein or whereon the same shall or may be then invested*, between and amongst all and every the children of the said Joseph Duncan Cork, who shall be then living, and the issue of such of them as shall be then dead, such issue to take *per stirpes*, as hereinafter mentioned, in equal shares and proportions, the shares and proportions of such of them as shall be a son or sons, to be paid respectively on their attaining the age of twenty-one years, and of such of them as shall be a daughter or daughters, on their respectively attaining the age of twenty-one years, or day or days of marriage; and, in case any of such children of the said Joseph Duncan Cork, being a son or sons, shall depart this life without leaving lawful issue living at the time of the decease of the said Joseph Duncan Cork, or shall survive him and afterwards depart this life under the age of twenty-one years, or, being a daughter or daughters, shall depart this life in the lifetime of the said Joseph Duncan Cork, without leaving lawful issue living at the time of his decease, or shall survive him and shall afterwards depart this life under the age of twenty-one years and unmarried, then I direct that the share or proportion of either of them so dying, shall accrue and go to the survivor of

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them, the said children of the said Joseph Duncan Cork, and such issue as aforesaid, and be paid at such ages and times as their, his or her original shares or proportions, share or proportion, and shall therewith be subject and liable to a similar chance and condition of accruer or survivorship. Provided always, and I do hereby direct, that, in case any of such children as aforesaid, shall depart this life in the lifetime of the said Joseph Duncan Cork, leaving lawful issue of *his, her or their [*426] body or bodies respectively, or in case any such children as aforesaid shall survive the said J. D. Cork, and afterwards depart this life under the age of twenty-one years, leaving lawful issue as aforesaid, such issue respectively shall, in such case, together and *per stirpes*, have, take and be entitled to, and I do hereby give to him, her or them respectively such shares or proportions of the said principal money last mentioned, whether original or accrued, as his, her or their parent or parents would have been entitled to, if he, she or they had survived the said J. D. Cork, and lived to attain the age of twenty-one years, or day of marriage respectively, as before expressed. And upon further trust that, in case any of such children or such issue as aforesaid, being a son or sons, shall not, at the time of the decease of the said J. D. Cork, have attained the age of twenty-one years, or, being a daughter or daughters, shall not have attained that age or been married, then that the said trustees or trustee, for the time being, of this my will, do and shall, forthwith, *invest or continue invested, the share or shares of such child, children or issue*, respectively, as aforesaid, as shall be so under the age of twenty-one years or unmarried respectively, *in such stocks, funds or securities as aforesaid*, for his, her or their benefit, respectively, until he, she or they shall attain the age of twenty-one years or be married respectively as aforesaid, and do and shall, in the meantime, and until the share or shares, or presumptive share or shares, whether original or accrued, of such child or children, or issue, respectively, of and in such trust moneys, stocks, funds and securities, shall become payable, transferable or assignable respectively, pay the dividends, interest and proceeds thereof, into the hands of the guardian or guardians, for the time being, if any, of such child or children or issue *respect- [*427]

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ively, in order that the same may be applied towards the maintenance and education of such child, children or issue; and, if no such guardian or guardians, then to apply the same for that purpose, in such manner as my said trustees or trustee, for the time being, shall think proper. Provided, always, that my said trustees or trustee, for the time being, do and shall, and I do hereby will and direct them to pay, apply or advance the whole or any part of the expectant or presumptive share or shares of such child, children or issue, or either of them, unto him, her or them, or to any person or persons for his, her or their preferment or advancement in the world, at such time or times and in such manner as my said trustees or trustee, for the time being, shall deem advisable.

“And upon further trust to stand and be seised and possessed of and interested in all the rest, residue and ultimate remainder of my said real and personal estate, effects and property not hereinbefore otherwise disposed of, in trust for my brother F. Author and my sisters Hannah Taylor, Ann May and Henrietta Snowden, their respective heirs, executors, administrators and assigns forever, as tenants in common, and to convey, assign and assure the same estate, effects and property to my said brother and sisters, when and so soon as conveniently may be *after satisfaction of the prior gifts, legacies, trusts, ends, intents and purposes of this my will.*” The testator then provided for the indemnity of the trustees, and appointed his wife and Joseph Douton executrix and executor of his will.

He died on the 1st of January, 1835.

The bill was filed, by the testator's brother and [*428] *sisters, to have the trusts of the will performed, his personal estate duly administered, and the clear residue thereof ascertained, invested and secured for the benefit of the persons entitled thereto; and to have the rights of all persons interested therein, and, especially, of Joseph Duncan Cork, ascertained and declared.

Joseph Duncan Cork, in his answer, said that he was the

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nephew of the testator's widow, and that the testator, for several years previous to the date of his will, had treated the defendant with great kindness and affection, and, in fact, almost as a son, having, at his own expense, liberally educated the defendant and allowed him to reside with him; and that the testator, for several years prior to his death, allowed the defendant 300*l.* a year; and that he believed that the testator, in bequeathing the two legacies of 10,000*l.* consols in trust for the defendant and his issue, either *intended to bequeath general legacies*, and that his personal representatives and trustees should invest, out of his real and personal estate, competent sums of consols to satisfy those two legacies, or else that the testator, through mistake and inadvertence, described in his will the two sums of 10,000*l.* consols as then standing in his name, instead of sums of those amounts in the new four per cents., in which stock he then held 35,000*l.*; and that the testator, at various times after the date of his will, mentioned to certain of his intimate friends, that he had left the defendant 20,000*l.* of his funded property. And the defendant submitted that, under the circumstances and for the reasons appearing in his answer, he was entitled to have two sums of 10,000*l.* consols—either appropriated and set apart, or raised and invested out of the testator's real and personal estate, in order to answer the two legacies of *10,000*l.* consols. [*429] But, if the court should be of opinion that the defendant was not so entitled, then he submitted that he was entitled either to have a competent part of the 35,000*l.* 3 1-2*l.* per cent. stock (into which the 35,000*l.* 4*l.* per cents. had been converted) standing in the testator's name at his death, applied in satisfying the two legacies, or to have the sum of 8,500*l.* consols, which was standing in the testator's name at the date of his will, and any other sum of like annuities which might have been standing in the testator's name at that time, applied, in the first place, in satisfaction of the first mentioned legacy of 10,000*l.* consols, and, afterwards, in satisfaction of the other legacy of the like sum; or, at all events, in satisfaction of each of the two legacies equally, as far as each such sums of 3*l.* per cent. consols standing in the testator's name as last aforesaid, would extend.

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The decree, at the hearing, directed the master to inquire and state what consols the testator had at the date of his will and at his death, but without prejudice to any question in the cause.

The master, in obedience to the decree and to subsequent orders in the cause, found that 8,500*l.* consols were standing in the testator's name at the date of his will, and 9,000*l.* consols, at his death; that 35,000*l.* new four per cents. were standing in his name at the date of his will, and that, by a transfer made by him in March, 1827, that sum was reduced to 32,000*l.* of the same stock, which, by an act of the 11th Geo. IV, was converted into 32,000*l.* 3 1-2*l.* per cent. stock; and that, in July, 1831, the testator sold out a considerable portion of that sum and invested it in 10,000*l.* bank stock: that the 9,000*l.* consols which [*430] were standing in his *name at his death, were composed of the 8,500*l.* standing in his name at the date of his will and 500*l.* subsequently purchased by him; and that the 9,000*l.* consols, and the 10,000*l.* bank stock, and 9,400*l.* 3 1-2*l.* per cents (which was the residue of the 32,000*l.* after the last mentioned sale,) were standing in his name at his death. The master further found that, by a deed of the 22d April, 1839, after reciting the testator's will and that Joseph Duncan Cork was then married and had issue one child, and that he had conducted himself, in all respects, with propriety, and to the satisfaction of the trustees, they released to him all the powers and discretions, given to or reposed in them by the will, of (a) or postponing the vesting, transfer or payment of the legacy of 10,000*l.* consols first mentioned in the will.

The cause now came on for further directions

Mr. Cockburn, Mr. Anderdon and Mr. Terrell for the plaintiffs, the residuary legatees, said, first, that the legacies of 10,000*l.* consols standing in the testator's name, were clearly specific: and that there was a fund, though an inadequate one, to answer those legacies.

(a) A blank was here left in the master's report.

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Secondly, that the case was not one in which evidence as to the state of the testator's property or any other extrinsic evidence was admissible in construing the will; inasmuch as there was no mistake or ambiguity in it.(a) They cited *Kirby v. Potter*,(b) *Barton v. *Cooke*,(c) *Humphreys v. Humphreys*,(d) *Ashburner v. Macguire*,(e) *Kampf v. Jones*,(g) *Shuttleworth v. Greaves*,(h) *Partridge v. Partridge*,(i) *Selwood v. Mildmay*,(k) *Fonnereau v. Poyntz*,(l) *Colpoys v. Colpoys*,(m) *The Attorney-General v. Grote*,(n) *Boys v. Williams*,(o) *Druce v. Dennison*,(p) *Miller v. Travers*,(q) *Ashton v. Ashton*,(r) *Purse v. Snaplin*.(s)

Mr. Stuart, Mr. Renshaw and Mr. Morris for the defendant J. D. Cork, and

Mr. Bethell and Mr. Lewis, for his child, contended that the legacies in question, were charged, by the will, upon the whole of the testator's property, and, consequently, that they were general legacies: and, in support of their argument, they relied upon the expressions used, by the testator, in different parts of his will. They cited *Fowler v. Willoughby*,(t) *Savile v. *Blackett*,(u) *Doe v. Cooper*,(v) *Crone v. Odell*,(w) *Collison v. Girling*.(x) And they observed upon *Boys v. Williams* and *Selwood v. Mildmay*. [*482]

(a) The arguments of the plaintiff's counsel had reference, principally, to the inadmissibility of the evidence, and as the Vice-Chancellor (though he said that he must, of course, hear all the evidence that the master had used in making his report) decided the case on the expressions which occurred in different parts of the will, without any regard to the evidence, it did not appear necessary to give the arguments at length.

(b) 4 Ves. 748.

(c) 5 Ves. 461.

(d) 2 Cox, 184.

(e) 2 Bro. C. C. 108.

(g) 2 Keen, 756.

(h) 4 Myl. & Cr. 35.

(i) Ca. Temp. Talb. 226.

(k) 3 Ves. 306.

(l) 1 Bro. C. C. 472.

(m) Jacob, 451.

(n) 3 Mer. 316.

(o) 2 Russ. & Myl. 689.

(p) 6 Ves. 385.

(q) 8 Bing. 244.

(r) Ca. Temp. Talb. 152.

(s) 1 Atk. 414.

(t) 2 Sim. & Stu. 354.

(u) 1 P. W. 777.

(v) 1 East, 229.

(w) 1 Ball & Beatt. 449.

(x) 4 Myl. & Cr. 63.

Mr. *Cooper* appeared for the trustees.

THE VICE-CHANCELLOR:—In order to determine the meaning of this testator, as well as to determine the meaning of every other testator, it is the duty of the court to look through the whole of the will, in order to see in what sense the testator has used certain words upon which a question arises.

It is clear, upon the face of this will, that the testator has used the word "sum" in the sense of value: because in the bequest which is made to the children of J. D. Cork, which relates to the second sum of 10,000*l.* consols, I find this phraseology: "for and during the term of his natural life, and, from and immediately after his decease, upon trust to pay and divide the said principal sum of 10,000*l.* consols, or the stocks, funds or securities wherein or whereon the same sum shall or may be then invested." It is clear, therefore, that the testator so conceived of a sum of 10,000*l.* consols, as that it might be invested in stocks, funds or securities, not any one of them being consols: because the sentence shows that he uses the words: "stocks, funds or securities," which follow the word "or," in contradistinction to the word "consols;" and, therefore, that sentence is not intelligible unless you take the word "sum," in the sense of "value;" and then the [*438] whole is clear; for it will be: "whereon the *same value shall or may be then invested, between and amongst all and every of the children." The value might be found in stocks or securities other than consols. If that is the true interpretation of the word "sum," in that part of the will, the same interpretation must be put upon it, where it is used with respect to that very thing which, immediately before, is given to J. D. Cork for his life; because his children were only to take in remainder, that which was given to him for life. And, if that be the true interpretation of the word "sum," then look at the way in which this sum of 10,000*l.* consols is given to Cork for life with remainder to his children. The direction is that the trustees: "shall and do, from and immediately after the decease of my said wife, stand and be possessed of and interested in the further sum of 10,000*l.* consols." He uses the word "further" with ref-

erence to the preceding sum: he means, in the second place, to give a thing of the same value as he had before given absolutely; that is, to give the value of stock to Cork for life, with remainder to his children, in addition to the prior bequest, of the same value, to him absolutely. It seems to me to be impossible to understand this testator in any other sense than as having reference to the value of the thing, rather than to the description of it.

If you go through the will, you will see what notions the testator had about his property. He commences his will by taking notice that his wife was entitled, under their marriage settlement, to the sum of 2,000*l.*; and he says: "Now I hereby will and direct my executrix and executor hereinafter named, by and out of my funded estate or property, or such of my estate and property as shall, at the time of my decease, be funded, to pay and satisfy, unto my said wife, the said sum of 2,000*l.*, as soon as conveniently may be after my *decease." Now, [*434] as to the expression, "funded:" ordinarily speaking, one might suppose that funded property would mean property in the funds: and it appears to me that that is the meaning of the testator; because, in a subsequent part of his will, he has taken notice of the fact that part of his property may be in what he calls government or real security, and that part may not; but that part which is not, is to be vested in government or real security; and that affords some sort of clue to discover what the testator means by his funded estate.

After making a disposition to his wife, of certain specific chattels, he gives all the rest, residue and remainder of his real and personal estate, effects and property whatsoever and wheresoever, and of what nature and kind soever the same may be, to his wife and another trustee, upon trust to collect, get in and receive all debts and sum and sums of money which shall be due, owing or belonging to him at the time of his decease, and not vested in or secured upon government or real security. Then he leaves that, and goes to another thing: "and to do all such acts as may be necessary for vesting in them, my said trustees and the survivor

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of them and the executors and administrators of such survivor, all moneys due, owing or belonging to me at the time of my decease, which shall or may be then invested upon government or real security:" so that, if there were any sum of consols standing in his name at the time of his death, it is, by express direction, to be transferred into the names of the trustees. I notice that, because it throws a light upon the bequest of 10,000*l.* consols to the children: for if, under this first part of the will, the 10,000*l.*

consols were to be invested in the names of the trustees, [*485] where would be the 10,000*l.* consols *standing in his name? Then he goes back again to the property unfunded, and says: "And when and from time to time so soon as such debt or debts, sum or sums of money first mentioned, shall be got in and received, to lay out and invest the same or so much and such part thereof as shall not be otherwise required for the purposes of this my will, upon government or real security, in the names or name of them, my said trustees above named, or of the survivor of them, or of the executors or administrators of such survivor." Therefore the general scheme of this testator's will was, in the first instance, to have everything laid out on government or real security in the names of the trustees. Then he says: "And, further, that they, my said trustees for the time being of this my will, do and shall, by and out of the moneys so as aforesaid or otherwise to come to their, his, or her hands:" then here is a strange contradiction: "in the first place, fully to pay and satisfy all my just debts:" whereas, according to the words as they stand, the first thing they were to do was to collect the outstanding unfunded property, and place it in government or real security; but here they are directed, in the first place, to pay all the debts. Then he proceeds: "And as to my estate and property unfunded, if that shall be sufficient:"—it appears to me he here means to speak of the surplus of the property being unfunded at the time of his death, which may remain after satisfaction of his debts, if that shall be sufficient:—"and if not, then, as to my general personal estate, subject thereto; and, as to my funded estate and property, subject to the aforesaid sum of 2,000*l.* sterling." Now that is consistent; because he had directed the 2,000*l.* sterling to come out of the

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funded estate, without, I apprehend, any very clear notion of what he really meant to be done with reference to the 2,000*l.*; but, if there was *some loose money not in the funds, it would be, *prima facie*, the duty of the executors to pay the 2,000*l.* out of that, and not to take the trouble of investing for the purpose of selling what they had invested, and then to pay the 2,000*l.* “Then upon further trust that the said trustees for the time being of this my will, shall stand and be seised and possessed of and interested in the rest, residue and remainder of my said estate, effects and property, both real and personal, upon trust to pay and apply, to my said wife, her appointees or assigns to be named in writing under her hand, or allow her to retain the rents, interest, dividends, proceeds and profits of all such rest, residue and remainder of my said estate, effects and property, except the sum of 10,000*l.* consols hereinafter mentioned.” It is true that he goes on to use the word, “sum,” but it seems to me to be manifest, from the passages which I have read, that, by the term, “sum,” he only means value; the value of the 10,000*l.* consols. “And upon further trust to pay and apply the interest, dividends, profits and proceeds of the sum of 10,000*l.* consols, now standing in my name in the books of the governor and company of the Bank of England, for and towards the maintenance, education and support of my adopted nephew, Joseph Duncan Cork, for and during the natural life of my said wife; and, after the decease of my said wife, in case the said Joseph Duncan Cork shall not then have attained the age of twenty-one years, then to pay and apply such interest, dividends, profits and proceeds to and for the purposes aforesaid, until he shall attain such age, if he shall so long conduct himself with propriety.”

Now the testator is here using phrases which, of themselves, are inapplicable to 10,000*l.* consols, but perfectly applicable to the *value* of 10,000*l.* consols, *when that is invested in government or real security; because then there might happen to be interest, dividends, profits and proceeds: part might be invested in one fund, and part in another; and so there might be such a state of things as would make those

words applicable to the subject: but, as they stand, they are inapplicable to it.

Then, similar words follow with respect to the circumstance of J. D. Cork attaining the age of twenty-one; because, then, the trustees are to pay, apply and transfer unto him the said principal sum of 10,000*l.* consols. Now, if you read "value" for "sum," then the words have some sense; for they might *pay* to him the value, they might apply to him the value, they might transfer to him the value; but the word "pay," seems a very inapplicable word if it is to be strictly confined to a sum of 10,000*l.* consols, which could hardly be paid, but might be transferred. Whereas the testator takes a larger view of what might be the state of his property at the time when J. D. Cork should attain twenty-one, and, therefore, under the idea, of which his mind was full, that he might have property of the value of 10,000*l.* consols, standing in various securities, he uses these words, "to pay, apply and transfer."

Then follows the passage to which I have before referred, which throws light on the first passage, namely, "the further sum of 10,000*l.* consols now standing and being in my name." Then the same words, "dividends, profits and proceeds," are again introduced, and, of course, they are subject to the same observation. And then, in the subsequent part of this bequest, which regulates the mode in which the children are to enjoy [*438] the second sum of 10,000*l.* consols, if it should *come to them after the death of their father, we find the words, "the share or shares of such child or children in such stocks, funds or securities as aforesaid:" and those words are repeated a few lines below: "in such trust moneys, stocks, funds and securities." Then, finally, come the words (I do not think much turns on them) that the trustees are to transfer the ultimate residue, after the satisfaction of the prior gifts, legacies, trusts, ends, intents and purposes of the will, to the brother and sisters of the testator.

Therefore, my opinion upon the true construction of this will, is that the testator is not to be taken to have given two sums of

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consols which might be standing in his name; but to have given, twice over, the value of the sum of 10,000*l.* consols. And, if that is so, inasmuch as there is general property enough to answer the bequests, all the observations that have been made about giving specific sums of stock, and giving things specifically, are inapplicable to the case.

My opinion is that it would be doing a great injustice to what, upon the simplest perusal of the will, one cannot fail to see must have been the intention of the testator, if I were to pin down the construction to the narrow words which are found in the three sentences where the sum of 10,000*l.* consols is spoken of, and not to give them that ampler meaning in which, as I think, it is evident, from the context of the will, that he meant to use them, namely, as designating the value of the sum of 10,000*l.* consols, and not the sum itself.

Declare that the legacies of 10,000*l.* consols, are general legacies, and that, as such, they are to be provided for out of the testator's general estate.

**June 30th.*—The cause was placed in the paper on [*439] this day, for the purpose of having the minutes of the Vice-Chancellor's order settled.

Mr. *Anderdon* for the plaintiffs, the residuary legatees:—As the court has decided that the legacies of 10,000*l.* consols are general legacies, and as consols have risen since the testator's death, I submit that the legatees are not entitled, as against the residuary legatees, to have two sums of 10,000*l.* consols purchased at the present price, but to have only so much money laid out in that stock as would have been required to answer the legacies either at the death, or at the end of the first year after the death of the testator.

Mr. *Stuart* for J. D. Cork:—There are above 23,000*l.* consols in court in this cause; and the legatees are entitled to have two sums of 10,000*l.* consols each, transferred, from the fund in court,

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to their account. They are entitled to 10,000*l.* consols each, whatever may be the price of that stock.

Mr. *Anderdon* in reply :—The testator had not, either at the date of his will or at his death, consols sufficient to answer the legacies. In consequence of which they must now be provided for out of his general estate: and, that being so, the legatees are not entitled, as against the residuary legatees, to have the full amount of their legacies purchased at the present high price of the funds. Suppose that the assets had not been sufficient to pay all the legacies in full: in that case, in order to ascertain how much these legacies ought to abate, the value of them must have been calculated according to the price of consols at the [*440] *end of the first year after the testator's death. *Blackshaw v. Rogers.*(a) That case establishes that the criterion of the value of a stock legacy, is the price of the stock at the time when it ought to have been purchased. If the court were to adopt the course suggested by Mr. *Stuart*, it would treat these legacies as being both general and specific.

THE VICE-CHANCELLOR:—If there had been a deficiency of assets at the testator's death, and it had been necessary that all the legacies given by the will should abate proportionably; then the value of the legacies in question, must have been estimated according to the price of consols at the end of the year next after the testator's death. But if the assets were sufficient, as I understand they were, then the legatees would have been entitled to have the full amount of their legacies purchased and transferred into their names at the end of the year: and the right which they then had still continues, the assets being still sufficient. If what ought to have been done, had been done at the proper time, the legatees would have taken 10,000*l.* consols each; and what they would then have taken, they would have had now. Consequently a sum of 10,000*l.* consols must be transferred to the separate account of each legatee, from the consols now in the name of the Accountant-General to the general credit of the cause.

(a) 4 Bro. C. C. 349, cited.

1843.—Walford v. Pemberton.

*WALFORD v. PEMBERTON.

[*441]

Practice.—Supplemental Bill.

1843: 2d May.

A supplemental bill may be filed after replication, without the leave of the court, in order to state matters which occurred before the filing of the original bill, but were not discovered until after replication.

AFTER replication filed but before publication had passed in the original suit, the plaintiff, without having obtained the leave of the court, filed a supplemental bill for the purpose of putting in issue matters which occurred before the filing of the original bill, but which, as the supplemental bill alleged, did not come to the plaintiff's knowledge until after replication had been filed in the original suit.

The defendant demurred for want of equity.

Mr. *Stuart* and Mr. *Green*, in support of the demurrer, said that it was irregular to file a supplemental bill, when the same purpose might be obtained by amending the original bill, under the 15th of Lord Lyndhurst's amended orders: (a) that the supplemental bill was an evasion of that order, and an attempt to obtain the benefit of it, without complying with the conditions which *it imposed. They cited *Colclough v. Evans*, (b) *Crompton v. Wombwell*; (c) and *The Attorney-General v. The Fishmonger's Company*. (d) [*442]

(a) The 15th order allows a plaintiff to amend, once, as of course, after answer and before replication; but if he wishes to amend a second time, he must make a special application, supported by affidavit, that the draft of the intended amendments has been settled and signed by counsel, and that they are material to the plaintiff's case. The 15th order prescribes that, after a replication has been filed, the plaintiff shall not be permitted to withdraw it and amend his bill, *without a special order made on a motion, with notice, and supported by affidavit that the amendment is material, and could not, with reasonable diligence, have been sooner introduced into the bill.*

(b) *Ante*, Vol. IV, p. 76.

(c) *Ibid*, 628.

(d) 4 Myl. & Cr. 1. See Judgment, pp. 9 & 10.

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Mr. *Bethell* and Mr. *W. T. S. Daniel* appeared in support of the bill, but

The VICE-CHANCELLOR, without hearing them, said:—I have heard nothing which satisfies me that a party is deprived, by the 15th order, of the right which he unquestionably had before, of filing a supplemental bill for the purpose of putting in issue matters discovered since the filing of the replication. That was the old right, and *prima facie*, that right remains.

If my decision in *Crompton v. Wombwell*, had been wrong, it was very easy to set it right. It was a case that was very much litigated; and therefore it is but reasonable to conclude that if there had been a conviction, in the minds of those against whom I decided, that the decision was wrong, means would have been taken to set it right; but no such means were taken.

With respect to the observations made by Lord Cottenham, C., in *The Attorney-General v. The Fishmonger's Company*, on *Colclough v. Evans* and *Crompton v. Wombwell*, I beg to say that I do not see any inconsistency or difficulty in drawing the line between those two cases. In the first of those cases, the plaintiff filed a bill which he called a supplemental bill, and a [*448] demurrer was put in to it, and allowed. The ground for allowing the demurrer, was that the bill, from the very nature of its statements, could not be considered as supplemental, but was virtually an amendment, because it sought to state a fact in a way diametrically contrary to the way in which the fact had been stated in the original bill: and it struck me that however pressing the necessity might be to have the fact stated correctly, that is, according to the second view of it, the proper method of doing so was by amending the original bill; and, therefore, I would not allow a bill called supplemental, to have validity as a supplemental bill, when it was perfectly plain that the proper method of rectifying the record, was to amend.

The other case was one in which a supplemental bill was filed, and where, according to the practice of the court, a supplemental

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bill might be filed. And I do not observe that what Lord Cottenham said, in *The Attorney-General v. The Fishmongers' Company*, prejudices the question. All that his Lordship said was, if the parties had a right, let them exercise it; but he never decided the question whether they had or had not the right. Therefore, it is in no manner an authority in support of the present demurrer.

In my opinion, there is a very considerable distinction to be taken between an amendment before replication and an amendment after replication: there is a greater probability of success in an application to amend before replication, than in an application to amend after replication; and the fact, that the 13th order has gone on to direct that part of the foundation of the application shall be the actual amendment of the draft with the approbation of counsel, proves it. Because the *court [*444] would never have subjected the party, in the first instance, to the necessity of going to the expense of consulting counsel, and having the draft approved, (as it has done by the 13th order,) and have omitted that condition in the 15th order, unless the difference had been intended. The orders of 1828 were, for the most part, framed by Sir John Leach, a most astute judge, who perfectly well knew what his own meaning was, and also how to express it with the greatest clearness and accuracy; and no one can read the 13th and the 15th orders without being struck with the difference between them.

At present, it has not been shown to me that it is contrary, either to the course of the court or to the construction of the 15th order, that such a supplemental bill as this should be filed; and therefore I shall overrule the demurrer.(a)

(a) See *Ranger v. The Great Western Railway Company*, ante, p. 368.

(a) *Ante*, Vol. VI, p. 240.

(b) 19 Ves. 459.

1843.—Young v. Macintosh.

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*YOUNG v. MACINTOSH.

Legacy.—Will.—Construction.

1843: 2d May.

Testator bequeathed to his daughter Eliza, 2,000*l.* for life, the principal to be equally divided among her children, *should they have attained twenty-one*: and, to the two children of his late daughter Jemima, 1,000*l.* each, *to be paid* on their attaining twenty-one: Held, that the legacies to the children were contingent on their attaining twenty-one, and that they were not entitled to interest in the meantime.

Testator left to his daughter Jane, the sum of 2,000*l.*, *to be settled on her* when she married, or to be paid to her on her attaining twenty-one: should she die not leaving issue, the 2,000*l.* to fall into the residue of his estate. Jane married in her father's lifetime. The court directed the legacy to be settled in trust for her separate use for life; remainder for her children living at her death, according to her appointment; in default of appointment, for her sons at twenty-one, and her daughters at that age or on marriage; remainder for her next of kin; and, if she had no child living at her death, the legacy to become part of the testator's residue.

PETER LITTLEJOHN, by his will dated the 5th of January, 1823, directed his debts to be discharged as soon as convenient after his decease, and gave the interest of all such worldly estate and effects as he might be possessed of or entitled to at his decease, to his wife, Jane, for her life, and, at her demise, the principal to be distributed as follows:

"To my daughter Maria, the widow of the late Captain Peter Young, for her use and benefit during the period of her natural life, 3,000*l.* sterling: the principal, at her death, to be equally divided between her two children should they have attained the age of twenty-one years: should either of them die, the survivor, in that case, to have 2,000*l.* only, and the remaining 1,000*l.* to fall into the residue of my estate. To my daughter Eliza, the wife of Captain Ivie Campbell, the sum of 2,000*l.* sterling, for his and her use and benefit during the period of her life:

[*446] on her decease, **the principal to be equally divided among her children by the said Captain Ivie Campbell, should they have attained the age of twenty-one years*: but should she die not leaving issue, in this case, the 2,000*l.* to fall into the residue of my estate.

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"To the two children of my late daughter Jemima, by Mr. Henry Walters, I leave 1,000*l.* sterling each, *to be paid on their attaining the age of twenty-one years*: either or both dying before that period, the legacy or legacies to fall into the residue of my estate. To my son, William Douglas, I leave the sum of 3,000*l.* sterling, *to be paid to him on the demise of his mother, should he then have attained the age of twenty-one years*: should he die before that period, the 3,000*l.* to fall into the residue of my estate.

"To my daughter Jane, I leave the sum of 2,000*l.* sterling, *to be settled upon her when she marries, or to be paid to her on her attaining the age of twenty-one years*: should she die not leaving issue, this 2,000*l.* to fall into the residue of my estate. The sums bequeathed to my son, William Douglas, and to my daughter Jane, are to be appropriated, that is, the interest thereof, to their education and maintenance, should they not have attained the age of twenty-one years, or the latter not be married at the period of the decease of her mother, at the discretion of the executors herein named. The rest and residue of my estate which may accrue from the lapse of lives or from any other cause or source, I direct may be equally divided among my surviving children and their issue, share and share alike, on their respectively attaining the age of twenty-one years." The testator then appointed four persons, of whom the defendant Macintosh, was the sole survivor, the executors *of his will. [*447] After the date of the will, the testator's daughter, Eliza Campbell, died, and his daughter Jane intermarried with John Day Stokes; but there was no issue of that marriage.

The testator died in January, 1834, leaving his wife and all his children and grandchildren named in his will, except his daughter Eliza Campbell, him surviving. His widow died in June, 1835.

The bill was filed by the testator's daughter Maria Young, and his son, William Douglas Littlejohn, against Mr. Macintosh, Mr. and Mrs. Stokes, Ivie Campbell, the only child of Eliza Campbell, Peter Young and James Gavin Young, the children of Mrs.

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Young, and Thomas D. Walters and Henry Littlejohn Walters, the children of the testator's deceased daughter Jemima. All the parties were adults. The testator's property consisted of a leasehold house and of stock and cash to the amount of about 18,000*l*. The bill prayed that it might be declared that the defendants Ivie Campbell, T. D. Walters and Henry L. Walters, the children of Mrs. Campbell and Mrs. Walters, *did not become entitled to any interest on their legacies until they attained twenty-one respectively*; and that it might be also declared that the 2,000*l*. given to Mrs. Stokes, *ought to be settled on her and her issue*; and that, in case of her death without issue, the same would form part of the testator's residuary estate.

Mr. *Sidebottom* for the plaintiffs.

Mr. *Romilly* for J. D. Stokes, and Mr. *Totter* for Jane, his wife, contended that the gift to the children of Mrs. Campbell, [*448] was contingent on their attaining twenty-one; *and, that consequently, the intermediate interest fell into the testator's residuary estate; as did also the interest on the legacies given to the children of the testator's daughter Jemima, and to his son, W. D. Littlejohn: for the gift and the time of payment of those legacies, were in one and the same sentence, and, therefore, those legacies also were contingent on the legatees attaining twenty-one.

Mr. *Walpole*, for the children of Mrs. Campbell and Mrs. Walters, said that the legacies given to his clients, were to be severed from the residue at the time of the death of the testator's widow, and, therefore, they carried their fruits with them from that time: that there was a distinction between the legacy to the children of Mrs. Campbell and the legacy to the children of Mrs. Walters; for the former was given to Mrs. Campbell for life, and, *on her death*, it was to vest in her children, and, therefore, at all events, the defendant Ivie Campbell, her only child, was entitled to interest on his legacy from the death of the testator's widow.

THE VICE-CHANCELLOR:—With respect to the legacy given

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to the children of the testator's daughter Eliza Campbell, after the death of their mother; nothing is given to them until they attain twenty-one; and, therefore, that legacy could not carry interest in the meantime. And, with respect to the legacies given to the testator's son, W. D. Littlejohn, and to the children of his daughter Jemima, *to be paid* on their attaining twenty-one; interest could not become due on those legacies, before the day of payment.

As to the legacy given to Mrs. Stokes.

Mr. Romilly, for her husband, said that, at the testator's *death, she was married but under age, and that [*449] the true construction of the bequest in her favor, was that, in one alternative, namely, in case she married after the testator's death and before she attained twenty-one, then the legacy was to be settled on her and her children, and, if she died without issue, it was to fall into the residue; but that alternative was out of the question, because she was married at the testator's death: that, in the other alternative, the legacy was to be paid to her, *absolutely*, on her attaining twenty-one.

Mr. Toller for Mrs. Stokes, said that her legacy was directed to be appropriated, and the interest of it was to be applied for her maintenance and education, should she not have attained twenty-one or be married at the death of the testator's widow; so that there was a gift of the principal, with interest until the principal should become payable; and, consequently, she took a vested interest in her legacy: that the words: "should she die not leaving issue," meant, either should she die under twenty-one, or unmarried, or before the death of her mother, that is, before her legacy became payable. *Monteith v. Nicholson.*(a)

The next question is, what is the meaning of the words: "to be settled upon her." I submit, that, there being no allusion to

(a) 2 Keen, 719.

 1843.—*Young v. Macintosh.*

her children, the meaning of that expression is that the legacy should be so settled on her as that her husband should take no interest in it, or, in other words, that it should be settled on her for her separate use, absolutely. *Laing v. Laing*.(a)—[THE VICE-CHANCELLOR:—I see no reference to any husband whatever.]

[*450] *Mr. *Stinton* appeared for the defendant *Macintosh*.

Mr. *Sidebottom*, in reply, contended that the legacy was to be settled on Mrs. Stokes and her children; and that, if she died without children, it was to fall into the residue. He added that, in *Laing v. Laing*, a discretion was given, to the executors, with respect to the settlement.

THE VICE-CHANCELLOR:—In this, as in every other case which arises on a will, the court is bound to give effect to all the words of the instrument, as far as it can.

The testator has said: "To my daughter Jane, I leave the sum of 2,000*l.* sterling, to be settled on her when she marries, or to be paid to her on her attaining the age of twenty-one years." It is plain to me, that, by those words, he meant that the legacy should be paid to his daughter, on her attaining the age of twenty-one. But he has said also: "to be settled on her when she marries." In my opinion he gives that direction in contradistinction to the direction that the legacy should be paid to his daughter on her attaining twenty-one. He evidently contemplated a marriage during infancy; and meant that, in that event, the legacy should not be paid to his daughter, but should be settled on her.

The proviso: "should she die not leaving issue," is incapable of being taken in connection with the direction to *pay* the legacy to the daughter on her attaining twenty-one: but it may be taken in connection with the direction to *settle* it: and, in my

(a) *Anie*, Vol. X, p. 315.

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opinion, it means that the issue of the daughter, shall be objects of the settlement.

*The only remaining question is, what description [*451] of issue did the testator refer to? It appears from the bequest to Mrs. Campbell, that he used the words, "children" and "issue," as synonymous with each other: and the consequence is that the legacy must be settled on Mrs. Stokes for her separate use, for her life, and after her decease, on her children living at her death; and if she dies without leaving a child, then it must fall into the residue of the testator's estate.

The following decree was drawn up:—Declare that the defendants Ivie Campbell, Thomas D'Oyly Walters and Henry Littlejohn Walters, are entitled, under the will of Peter Littlejohn, the testator in the pleadings of this cause named, to the respective legacies of 2,000*l.*, 1,000*l.* and 1,000*l.* with interest thereon respectively at the rate of 4*l.* per cent. per annum, from the days on which they respectively attained the age of twenty-one years; declare that the legacy of 2,000*l.*, given by the said testator's will, to the defendant Jane Stokes, ought to be settled upon her and her children living at the time of her decease, and that, if she shall die without leaving any such issue, then that the said legacy of 2,000*l.* will fall into the residuary estate of the said testator: and the defendant Jane Stokes, by her separate answer, not requiring an account to be taken of the testator's personal estate, and all parties by their counsel at the bar, waiving the taking of such accounts, this court doth order and decree that the leasehold estates of which the said testator was possessed at the time of his death, be sold by the defendant Eneas Macintosh, by public auction or private contract as he shall think fit. And it is ordered that it be referred to the master of this court in rotation, to *approve of a proper settlement of the [*452] legacy of 2,000*l.* bequeathed to the said defendant Jane Stokes, or so much thereof as shall remain after deducting the costs hereinafter directed to be paid thereout: and it is ordered that the same be vested in trustees to be appointed by the said

 1843.—Stuart v. Lord Bute.

master, in trust to pay the income arising therefrom to the said defendant Jane Stokes, during her natural life, for her sole use, on her separate receipt, and, after her decease, in case she shall leave a child or children her surviving, in trust for such child or children according to her appointment, and in default of any such appointment, in trust for such child or for such children equally, (if more than one,) to vest, as to a son or sons, when he or they shall attain the age of twenty-one years, and as to a daughter or daughters, when she or they shall attain that age or marry: and, if all the children of the said Jane Stokes who shall survive her, shall die without attaining a vested interest, then upon trust for such person or persons as she, the said Jane Stokes, by her will shall appoint, and in default of such appointment, or so far as any such shall not extend, in trust for such person or persons as would have been entitled, as her next of kin, under the statutes for the distribution of intestates' effects, to her personal estate, in case she had died unmarried and intestate: and in case there shall not be any child of the said defendant Jane Stokes, living at the time of her death, then such last mentioned legacy to become part of the testator's residuary estate. . . . Let it be referred to the taxing master of this court in rotation, to tax all parties their costs respecting the said settlement, and of preparing and executing the same and relating thereto, as between solicitor and client, and let such costs, when taxed, be paid out of the said legacy of 2,000*l.* directed to be settled: and any of the parties are to be at liberty to apply, &c.

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*STUART v. LORD BUTE.

Practice.—Production of Documents.

1843: 9th May.

A., B. and C. had been co-partners in the working of certain collieries. That co-partnership having determined, and a new co-partnership having been formed between C., D. and E., the plaintiff, in a suit relating to the affairs of the late co-partnership, to which C. was a party, served D. & E., and the agent of their

1843.—Stuart v. Lord Bute.

firm, (none of whom were parties to the suit,) with a *subpœna duces tecum*, requiring them to produce certain books of the late firm; and also moved that O. might be ordered to concur with D. & E., in producing the books, or causing them to be produced, and to give or join in giving such directions to D. and E. and the agent, as should be necessary to enable or authorize them to obey the *subpœna*. The court refused the motion with costs.

THIS suit related to the affairs of a late co-partnership in certain collieries in Northumberland, now worded by the defendant Lord Wharnccliffe and his co-partners, Lord Ravensworth and Mr. Bowes. Lord Wharnccliffe had been a member of the late firm; but neither of his co-partners had been a member of it, and neither of them was a party to the suit.

Under the decree in the cause, interrogatories were exhibited for the examination of Lord Warncliffe in the master's office, to which his Lordship put in an answer which was held to be insufficient. Whereupon he put in a further answer, and that also met with the same fate.^(a) His Lordship then put in a second further examination, stating that, on the 29th of December last, he went to the office of the existing co-partnership, and not knowing in what part of it the books and accounts of the late co-partnership were deposited, he requested Nicholas Wood, the agent of the co-partnership, to produce them to him in order that he might inspect and make extracts from them; but that Wood, acting as he stated, under the orders of the examinant's co-partners, refused to produce the books and accounts, or to permit the examinant to inspect them.

*The plaintiffs having thus failed to attain their object [*454] by excepting to Lord Wharnccliffe's examination, served Lord Ravensworth, Mr. Bowes and Mr. Wood with a *subpœna duces tecum*, requiring them to produce the books and accounts before the master on a certain day. And, in addition thereto, they now moved that Lord Wharnccliffe might be ordered to concur with Lord Ravensworth, Mr. Bowes and Mr. Wood, in producing the books and accounts, or causing them to be pro-

(a) See *ante*, Vol. XI, p. 442, and Vol. XII, p. 460. The decision on the further answer was affirmed by the Lord Chancellor.

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duced, and to give or join in giving all such directions and authorities to Lord Ravensworth, Mr. Bowes and Mr. Wood as should be necessary to enable or authorize them to obey the *subpœna*.

Mr. *Bethell* and Mr. *Phillips* in support of the motion, said that the court was in the constant habit of making orders for the production of documents, modified according to the circumstances of each particular case, and that the order sought to be obtained was one of that description: that Lord Ravensworth and Mr. Bowes had not the slightest interest in the books and accounts mentioned in the *subpœna*; and that Lord Wharncliffe was bound to consent to the production of them.

Mr. *Stuart* and Mr. *Parry* for the defendant Lord Wharncliffe, said that the application was unprecedented: that, as the court could not make an order on Lord Ravensworth and Mr. Bowes, to produce the books and accounts, it would be absurd to order Lord Wharncliffe to concur with them in doing that which the court had no jurisdiction to order them to do.

THE VICE-CHANCELLOR:—The court is asked by this [*455] application, to do that *which. as far as my experience goes, it never did before.

It would be improper for me to enter at all into the rights of the parties: I have neither Lord Ravensworth nor Mr. Bowes before me: and, therefore, I neither do nor can know their reasons for preventing that inspection of the books and accounts, mentioned in the *subpœna*, to which the plaintiffs are unquestionably entitled as against Lord Wharncliffe.

It strikes me that, if the plaintiffs have that full right to see the books and accounts of the original partnership which they allege they have, they ought to have so constructed their suit with regard to parties, as that the court should have before it all the persons interested in the books and accounts; and then an order might have been made, on the three present co-partners, for the production of them.

1843.—Sloggett v. Collins.

It appears from Lord Wharncliffe's last examination, that he went to the office of the co-partnership at Newcastle, for the purpose of inspecting the books; but that Wood, acting under the orders of Lord Ravensworth and Mr. Bowes, refused to allow him to inspect them. Therefore, whether Lord Ravensworth and Mr. Bowes have or have not any interest in the books, they at all events assume to have some control over them; and, in the present state of the record, I cannot decide that they have no interest in the books, so as to deprive them of the power which they assume.

I do not remember any instance in which this court has engrafted an order made on a party to a cause, on a *sub-pœna duces tecum* issued against a person not a *party, [*456] so as to amalgamate the characters of witness and party.

If the plaintiffs have the right which they contend they have, they may file a supplemental bill against Lord Ravensworth and Mr. Bowes, for the purpose of making them parties to the record; and they will then obtain, in the regular way, that order which they now seek to obtain by irregular and indirect means.

The present application is an ingenious experiment to avoid the necessity of filing a supplemental bill, and I shall refuse it with costs.

SLOGGETT v. COLLINS.*Amendment.—Practice.*

1843: 25th May.

An order to amend as the plaintiffs may be advised, does not authorize the names of co-plaintiffs to be struck out.

UNDER an order to amend, generally, the names of the six children of Ann Sloggett, who were co-plaintiffs with her, were struck out, together with the statements relative to their interests; and they were not made defendants.

 1843.—Lloyd v. Smith.

The VICE-CHANCELLOR ruled that the order did not authorize the striking out of the names of the co-plaintiffs, and ordered the amended bill to be taken off the file.

Mr. Bethell and Mr. Follett moved.

Mr. Stuart and Mr. Stinton opposed.

The cases cited were, *The Attorney-General v. Cooper*, (a) *Fel-
lowes v. Deere*, (b) *Brown v. Sawyer*. (c)

(a) 13 Myl. & Cr. 258.

(c) Ibid, 598.

(b) 3 Beav. 353.

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*LLOYD v. SMITH.

Pleading.—Parties.—New Orders of August, 1841.

1843: 29th May.

The 30th general order of August, 1841, applies to those cases only in which trustees have a present absolute power to sell real estate: and the 32d order does not apply to a case in which there is only one principal and one surety.

In 1841, T. Lyster, being indebted to the plaintiffs Messrs. Lloyd & Co., in 2,000*l.*, he and James Arkwright, his surety, gave to the plaintiffs their joint and several promissory note for securing the payment of that sum with interest. In 1842, Arkwright died, having devised his real estates to trustees, in trust for his daughter, for her separate use, for life, with remainder in trust for her children; and, if she should not leave a son who should attain twenty-one, or a daughter who should attain that age or marry, then in trust to sell and divide the proceeds amongst the children of his late father's brothers and sisters: and he authorized the trustees to sell the estates in his daughter's lifetime, with her consent in writing, and declared that their receipts should be sufficient discharges for the purchase moneys, and that the same should be held, by them, upon the trusts before expressed. The testator died in 1842.

1843.—Lloyd v. Smith.

The bill to which the executors and trustees of the will, the testator's daughter and her husband and infant child, were the only defendants, prayed that the testator's personal estate might be applied in payment of his debts; and, if it should be insufficient for that purpose, that the deficiency might be raised by sale or mortgage of his real estates.

Mr. *Smythe* for the defendants, objected, first, that the children of the brothers and sisters of the testator's late father, ought to have been made parties to the bill; and, secondly, that the assignee of Lyster, who had *become bankrupt, [*458] ought to have been made a party to it.

Mr. *Walker* and Mr. *Hale* in answer to the first objection, relied on the 30th general order of August, 1841, which directs that, in suits relating to real estate which is vested in trustees by devise, and they are competent to sell and give discharges for the proceeds of the sale and for the rents and profits of the estate, the trustees shall represent the persons beneficially interested in the estate or the proceeds or the rents and profits, in the same manner and to the same extent as the executors or administrators, in suits concerning personal estate, represent the persons beneficially interested in such personal estate; and that, in such cases, it shall not be necessary to make the persons beneficially interested in such real estate or rents and profits, parties to the suit.

In answer to the second objection, they relied on the 32d general order of the same date, which directs that in all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court, as parties to a suit concerning such demand, all the persons liable thereto; but that the plaintiff may proceed against one or more of the persons severally liable.

The VICE-CHANCELLOR said, that the 30th order applied to cases in which the devisees in trust had a present, absolute power of sale, and not to a case like the present, where the trustees had

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no power to sell during the life of the testator's daughter (who was living) except with her consent, and it did not appear that she had given her consent: that the 32d order applied [*459] to cases where *several* persons were liable in different characters, that is, some as principals and the rest as sureties; and then it was sufficient to make one individual of each class a party; but where there was only one principal and one surety, both of them must be made parties; and, consequently, both the objections must be allowed.(a)

(a) See *Miller v. Huddleston*, *post*, 467.

THE DUKE OF LEEDS v. LORD AMHERST.

Portrait.—Legacy.—Will.—Construction.

1843: 29th and 31st May.

Testator bequeathed the portraits of himself, of his grandfather and grandmother, of his mother and of the Duke of Schomberg, to A. B. The testator had one portrait of himself, one of his grandfather and grandmother, and one of his mother, and a three-quarters portrait and a portrait in crayons of the Duke of Schomberg, and also a picture in which the duke was represented on horseback, with a battle in the distance: Held, that that picture was a portrait of the duke, and that it passed, together with all the other portraits, by the bequest.

THE will of George William Frederick, late Duke of Leeds, the father of the plaintiff, was dated the 30th of July, 1836, and contained the following bequests: "I give and bequeath *the portraits* of myself, of my grandfather and grandmother, Lord and Lady Holderness, of my mother and *of the Duke of Schomberg*, my statue and cast of my dear son, the late Lord Conyers Osborne, and my busts of my dear wife and of my late dear daughter, and also all the linen, china, household goods and furniture and other effects which shall be in or about my house in St. James' Square at my decease, unto William Pitt, Earl Amherst, &c.," upon trust to permit the same to go as heir-looms to the estates which he had devised to his son-in-law, Sackville Walter Lane Fox and his issue in strict settlement. And, as to all the

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testator's *pictures*, prints, cameos, intaglios, busts, statues, gems and medals, china, books and household goods and furniture at Hornby Castle, (the family mansion,) **except* [*460] *the articles already bequeathed*, and all the residue of his personal estate and effects not thereinbefore specifically bequeathed, he gave and bequeathed the same to Lord Amherst, &c., in trust to sell and convert into money, and apply the proceeds as the primary fund in the discharge of his debts, funeral and testamentary expenses and pecuniary legacies, and to invest the residue in the purchase of lands to be settled to the same uses as were thereinbefore declared of the estates thereby devised to his son-in-law and his issue.

The testator died in July, 1838.

It was stated in a report made by the master in pursuance of an order in the cause, that the testator, at the date of his will and at his death, was possessed of one portrait of himself, one portrait of his grandfather, Lord Holderness, one portrait of his grandmother, Lady Holderness, and one portrait of his mother, and of *three portraits of the Duke of Schomberg*, namely, *a grand equestrian picture or portrait, a three-quarters portrait and a portrait in crayons*. And the master found that the grand equestrian picture or portrait, the three-quarters portrait, and the portrait in crayons of the Duke of Schomberg, as well as the portraits of the other persons above named, were included in the description: "The portraits of myself, of my grandfather and grandmother, &c."

The plaintiff excepted to the report; because *the grand equestrian picture, was not a portrait of the Duke of Schomberg*; and, if it was to be so deemed, *that it was not, or it was not certain that it was included in the description* in the will.

The grand equestrian picture represented the Duke of Schomberg mounted on a charger, holding a baton in his **right hand*, and with his countenance turned towards [*461] the spectator. He was in complete armor, except that

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he was without his helmet, which was held by an attendant. In the background, a battle, said to be the battle of the Boyne, was depicted: but the duke and his horse and attendant were, by far, the most prominent objects. Indeed, the battle was scarcely perceptible except on close inspection.

Mr. *Bethell* and Mr. *Lloyd* in support of the exceptions, said that the description in the will applied, strictly and correctly, to the three-quarters portrait of the Duke of Schomberg; but not to the grand equestrian picture; for *that* was not, *simply*, a portrait, that is, according to Dr. Johnson: "A picture drawn after the life," or, according to Sir Joshua Reynolds: "An exact resemblance of an individual;" but it comprised other objects than the figure of the Duke of Schomberg: that the bequest on which the question arose, ought not to be read as if the word "portraits," in the plural number, were inserted before every member of the sentence; for then there would be nothing to satisfy the words; inasmuch as the testator had only one portrait of himself, one of his grandfather, one of his grandmother and one of his mother; but *that* bequest ought to be read as follows: "The portraits of myself, my grandfather and grandmother, my mother and the Duke of Schomberg," so as to comprise only one portrait, in the proper sense of that term, of the duke, and of each of the other individuals mentioned in the bequest.

Mr. *Stuart* and Mr. *G. L. Russell* appeared in support of the report.(a)

[*462] *THE VICE-CHANCELLOR:—The first question is whether this equestrian picture can be properly denominated a portrait: because if it is not a portrait, unquestionably, it did not pass.

Now, with respect to the word "portrait," a definition has been given in the course of the argument; and I have looked

(a) The question raised by the exceptions, was argued at considerable length; but it did not appear to be of sufficient importance to require a full report of the arguments.

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into the matter myself, to see what is the origin of the word, and what meaning is ascribed to it, not only in English, but in French dictionaries: and it seems that, to a certain extent, it is used in a more enlarged sense in the English than it is in the French language.

The first thing that I have to observe about it, is that, in an edition of Richelet's Dictionary, which was printed in the year 1732, the author speaks of the word "portrait," as a French word, and explains the meaning of it in Latin, and then gives an interpretation of it in French. He says: "Portrait: *Imago, picta effigies. Ce mot se dit des hommes seulement; et en parlant de peinture, c'est tout ce qui represente une personne d'apres nature, avec des couleurs.*" In the French dictionary which has been lately published by Fleming and Tibbins, the explanation is this: "Portrait: *resemblance d'une personne.*" and there it stops. The word is evidently taken from the Latin word, "*pertrahere*," or "*pertractare*," both of which words derive their force from being compounded, in part, of the preposition *per*, which, when used in composition, signifies doing an act completely, thoroughly, or with labor; as in our word "perfect," and the Latin word, "*perfectum*."—[His Honor here cited passages from Horace's Art of Poetry, and from Cicero's works "*De Finibus*," and "*De Natura Deorum*," in which the words "*perfectum*," "*pertractans*" and "*pertractandum*" *occurred, in [*463] order to show the force of the preposition, *per*, when used in composition.]—It is plain, therefore, that that portion of the definition to which Mr. Bethell alluded, namely, the exact and minute, is derived from that portion of the word which consists of the Latin word, "*per*." If you look into the English dictionaries you will find that Dr. Johnson's definition of the word "portrait," is: "A picture drawn after the life," that is, corresponding to the life. Then Bailey, in his dictionary, gives an explanation of the term. Now, Bailey's is a remarkably good dictionary, and, in some respects, better than Dr. Johnson's: because it is not confined to words found merely in books of authority, but contains also words which are in common use; and, perhaps, common usage is the best expositor in the present case.

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He says: "Portraits: (with painters:) pictures of men and women, either heads or greater lengths, drawn from the life. The word is used to distinguish face painting from history painting."

Then it occurred to me that we could not have a better authority for the use of the word, "portrait," than the catalogue of paintings exhibited by the Royal Academy, and it struck me that if I looked into the catalogue for the present year, I might find some instance in which the term, "portrait," was applied to something else than merely the figure of a man: and I found one of the paintings described as containing portraits of certain race horses and their riders, that is of men on horseback and their horses. Besides which, we often see pictures of children on ponies or with favorite animals, described, by persons versed in the art of painting, as portraits of the children. And I must say that, if I had been asked whether the painting in question was a portrait or not, I should have answered, without [*464] hesitation, that it was: for, in my opinion, the *miniature representation of a battle, which is introduced in the background, in order to denote that the principal object was a great warrior, does not detract from its character as a portrait. The duke and his horse are the principal subjects of the picture; and the battle is represented so minutely, that it attracts hardly any notice; indeed it is scarcely perceptible except by persons who have good eyesight. I think, therefore, that the painting in question, which is called the equestrian picture, may be, without any impropriety, termed a portrait.

Upon looking into the will of the Duke of Leeds, I observe that there is an authority for the opinion that I have expressed, to be deduced from the will itself. For the testator, first of all, gives the portraits of himself, his grandfather and grandmother, Lord and Lady Holderness, of his mother, and of the Duke of Schomberg, his statue and cast of his son, the late Lord Conyers Osborne, and the busts of his wife and his late daughter, and other things; certainly not for the benefit of the present duke. Then he speaks of his pictures, prints and other chattels at Hornby Castle, except the articles already bequeathed. It is

clear, therefore, that he used the term, "portrait," as describing an article which, as he thought, was comprehended in the gift of the pictures. Consequently it appears, on the face of the will, that the testator considered the term, "picture," to be synonymous with(a) the term, "portrait."

Then it was said that, as the testator had but one portrait of himself, one of his grandfather, one of his grandmother, and one of his mother, it would be improper to say that more than one portrait of each individual passed by the bequest. I must say, however, that if I had been employed, as counsel, to draw the will of a person who had one manor in Middlesex, one *in Kent, one in Essex, and three in Surrey, I should [*465] have used the following words: "I devise all my manors in Middlesex, Kent, Essex and Surrey." And it seems to me, that no person commonly conversant with the English language, would have a doubt as to the fact of the three manors in Surrey passing under that devise. Accordingly, my opinion upon the bequest now under consideration, is that, whatever number of portraits of the Duke of Schomberg the testator might happen to have, they should all pass, by the bequest in question, notwithstanding he might have had but one portrait of each of the other individuals named in the bequest. The first question is, had the testator the property to give? and the next is, has he described it so as to give it? And as I find that the testator had, at the time he made his will, the portrait in crayons, the three-quarters portrait, and also the painting which has been called the equestrian picture, but which, I think, may be properly called a portrait, I am clearly of opinion that the bequest has passed the grand equestrian picture or portrait of the Duke of Schomberg, as well as the others, about which there is no dispute.

I do not think that any inference to the contrary can be drawn from the supposition that the duke could not mean to dismantle Hornby Castle, as far as lay in his power. What the duke's reasons were, I cannot tell; but it certainly appears, from his will,

(a) To include? (Qu.)

 1843.—The Duke of Leeds v. Lord Amherst.

to be perfectly plain that, for some reason or other, his son, who was to succeed him in the title and in the family mansion and estates, was not the object of his favor(a). For he has empowered his trustees, in the sale of any of his estates contiguous to or convenient to be enjoyed with the *settled family estates in the North or West Ridings of Yorkshire, or of any of his plate or other effects at Hornby Castle thereby authorized or directed to be sold under any of the trusts or powers thereinbefore contained, to offer them, in the first instance, to the proprietor of Hornby Castle for the time being, on such terms as his trustees should think fit; but he has declared that such desire was not to be deemed a direction or obligatory on his trustees, nor to confer any right of pre-emption on the proprietor of Hornby Castle, nor to prevent his trustees from selling such estates or effects to any other person or persons, if they should deem it advisable so to do. When I read this clause, it occurred to me that, whatever the reason might be, the person who was to succeed to the possession of Hornby Castle and the family estates, was not the primary object, to say the least, of the testator's favor; but that another member of the family was, in favor of whom and whose issue, the testator clearly made his will. And why the late Duke of Leeds should not have intended that this particular picture, which, it is to be observed, is a family picture, should not go along with a portrait of himself, of his own mother, and of his grandfather and grandmother, I do not see. They are all in *pari materia*. I cannot but think that, if anything is to be inferred from the rule *noscitur a sociis*, every picture of the Duke of Schomberg might be reasonably supposed to pass along with those which, unquestionably, were family pictures. And if I find the picture in dispute comprised in the words which the testator has used, it seems to me that there is nothing, whatever, apparent upon the face of the will taken altogether, which prevents me from saying that, although it is a portrait or a picture of the Duke of Schomberg on horseback, it passes by the bequest in question.

Exceptions overruled.

(a) The late Duke of Leeds left nothing to his son, the present duke, and the plaintiff in the cause, except his parliamentary robes.

1843.—*Miller v. Huddleston.*

**MILLER v. HUDDLESTONE.*

[*467]

Pleading.—Parties.—New Orders of August, 1841.

1843: 31st May.

If a person entitled to an annuity, payable out of the testator's personal estate and the proceeds of the sale of his real estate, files a bill for the administration of the whole of the testator's property, all the other annuitants and legatees must be made parties, notwithstanding the receipts of the trustees are made sufficient discharges.

THE testator in the cause devised and bequeathed all his real and personal estate to the trustees and executors of his will, in trust to sell and convert the same into money, as soon as conveniently might be after his death, and, out of the proceeds, to pay his debts, funeral and testamentary expenses, and to invest the surplus in the funds, and, out of the dividends, to pay annuities to certain persons, one of whom was the plaintiff, and to pay the remainder of the dividends to his wife for her life, and, subject thereto, he gave the trust fund to the executors and trustees, (who were his nephews,) and to two of his nieces: and he declared that the receipts of the trustees should be sufficient discharges to the purchasers of his real estate.

The bill, which was filed after the death of the testator's widow, and to which the executors and trustees were the only defendants, prayed for the usual accounts of the real and personal estate, that the real estate might be sold, and that the proceeds, together with the personal estate, might be applied in payment of the debts, and in providing funds for the payment of the annuities.

Mr. *Bethell* and Mr. *Lloyd* for the executors and trustees, said that the bill sought to have the entire estate administered, and, therefore, all the annuitants, and all the residuary legatees, ought to have been made parties to it.

Mr. *Wakefield* and Mr. *Stinton* for the plaintiff, *replied [*468]

 1845.—Thompson v. Speira.

upon the 30th general order of 1841, and cited *Pidgeley v. Rawling*.(a)

THE VICE-CHANCELLOR:—This bill, as it is framed, is not merely for a demand; but asks that the whole of the testator's real estate may be sold, and that the entire fund composed of the proceeds of the sale and of the personal estate, may be applied in payment of the testator's debts, and legacies and annuities; so that it deals with the whole of the testator's property, of every description: consequently, the case is not within the 30th order, and all the legatees and annuitants ought to have been made parties. If the bill had asked nothing more than that the arrears of the plaintiff's annuity might be paid to her, and that a fund might be provided for securing the payment of it in future, leaving it to the executors to pay the arrears and provide the fund as they might think proper, then the 30th order would have been applicable.(b)

Objection allowed. Costs of all parties to be costs in the cause.

(a) 1 Youn. & Coll. N. C. 552.

(b) See *Lloyd v. Smith*, ante, p. 457. See also, *Savory v. Barber*, 4 Hare, 135, which seems to be at variance with the case reported above.

[*469]

*THOMPSON v. SPEIRA.

Policy of Insurance.—Order and Disposition.—Notice.—Bankrupt.

1845: 9th, 10th and 26th July.

Actual notice of the assignment of a policy effected with the Equitable Assurance Society, is necessary to take the policy out of the order and disposition of the assured.(a)

In June, 1808, Richard John Brassey insured his life, in the Equitable Assurance Office, for 4,000*l*. In June, 1822, he, in contemplation of his daughter's marriage, assigned the fruits of the

(a) *Duncan v. Chamberlayne*, reported ante, Vol. XI, p. 123, overruled.

1845.—Thompson v. Speira.

policy to the plaintiff and another person, in trust, as to one-fourth part thereof, for his daughter, her then intended husband, and the children of their marriage, and, as to the remaining three-fourths, in trust for himself absolutely; but no express notice of the assignment was given to the office until the time after mentioned.

At the date of the assignment, Brassey was a partner in the banking-house of Lees, Brassey & Farr; and the plaintiff and his co-trustee, who were customers of the firm, suffered the policy and the assignment to remain in a safe, in which the firm deposited their own and their customers' securities for safe custody.

In June, 1835, Lees, Brassey & Farr became bankrupts; and their assignees having possessed themselves of the policy and the assignment, the plaintiff who had then survived his co-trustee, gave them notice of the assignment; and, a few days afterwards, sent a formal notice of it to the assurance office. The assignees, however, disregarded the notice and sold the policy to three of the defendants. In June, 1844, Brassey died; and, in December following, the bill was filed charging that Brassey, when he assigned the policy to the plaintiff and his co-trustee, was a *member of and a partner in the Equitable Assurance Society*; and, *therefore, the society received and had, or must be deemed *in* [*470] *equity, to have received and had, through and by means of Brassey, notice of the assignment at the time of the execution thereof*; and, consequently, the title of the plaintiff and his co-trustee to the policy, became perfect on the execution of the assignment, and the plaintiff was entitled to receive one-fourth of the fruits of the policy, which amounted, in the whole, to 11,740*l.* The bill prayed that the plaintiff might be declared to be so entitled; and that the trustees of the assurance office might be restrained from paying to the purchasers of the policy, and that the latter might be restrained from receiving more than three-fourths of the 11,740*l.*

The injunction having been granted, the purchasers of the policy, on the coming in of their answer, moved to dissolve it.

1845.—Thompson v. Speirs.

The question was whether, as the defendants contended, *actual* notice of the assignment ought to have been given to the assurance society, in order to take the policy out of the order and disposition of Brassey, the bankrupt; or whether, as the plaintiff insisted, the constructive or implied notice of the assignment which the society had, by reason of Brassey being a member of the society, was sufficient for that purpose. In other words, the question was whether the decision in *Duncan v. Chamberlayne*, reported *ante* Vol. XI, p. 123, could be supported.

Mr. *Bethell* and Mr. *Bacon*, in support of the motion, said that, where an assignment was made of a sum of money which either was actually due, or, on the happening of a future event, might become due to the assignor, from a third party, notice of the assignment was required to be given to that party for [*471] two purposes; first, *to prevent the assignor from receiving the money when it became payable; and, secondly, to enable a purchaser, before he completed his purchase, to ascertain, by inquiring of the party liable to pay the money, whether any prior assignment of it had been made: that an assignment was a secret transaction between the parties to it; and the Equitable Assurance Society being a numerous body, the constructive or implied notice of the assignment of a policy effected in their office, which was held to be sufficient in *Duncan v. Chamberlayne*, was not sufficient for the purposes above mentioned, and, consequently, had not the effect of taking the policy out of the order and disposition of the assignor: that the principle of constructive notice, was that the party sought to be affected by it, was estopped, by the circumstances of the case, from denying that he had notice; and it was upon that principle that notice to one partner, was held to be notice to his co-partners, *in matters relating to the co-partnership*: that, in the present case, Brassey ceased to be a partner in the assurance company, as soon as he had assigned his policy. *Dearle v. Hall*; (a) *Loveridge v. Cooper*; (b) *Williams v. Thorpe*; (c) *Ex parte Tennyson*; (d) *Ex parte Col-*

(a) 3 Russ. 1.

(b) *Ibid.* 30.(c) *Ante*, Vol. II, p. 257.(d) *Mont. & Bligh*, 67.

ville ;(a) *In re Styran* ;(b) *Ex parte Arkwright* ;(c) *Ex parte Wood* ;(d) *Ex parte Price* ;(e) *Ex parte Watkins* ;(g) *Ex parte Hennessey* ;(h) *Smith v. Smith* ;(i) **Edwards v. Scott* ;(k) [*472] *Gibson v. Overbury* ;(l) *West v. Reid* ;(m) *Ex parte Wilkinson*.(n)

Mr. Anderdon and Mr. Colvill, in support of the injunction, cited *Porthouse v. Parker* ;(o) *Moore v. Dunn* ;(p) *Bignold v. Waterhouse*.(q)

THE VICE-CHANCELLOR:—All the assured in the Equitable Assurance Office, are co-partners; and, that being so, the question is whether, if one of the assured assigns his policy, the notice which the law presumes every partnership to have of the acts of its members, is sufficient to take the sum secured by the policy, out of the order and disposition of the assignor, so that it shall not pass to his assignees in the event of his becoming bankrupt: and as it is admitted that if the notice to which I have alluded, would have prevented the office from paying the amount of the policy to the assured, the amount would have been taken out of the order and disposition of the assignor, the question resolves itself into this, namely, whether the notice would have had the effect of preventing the office from paying the sum insured, to the assignor.

When the case of *Duncan v. Chamberlayne* first came before me,

- (a) Mont. 110.
- (b) 2 Mont. Deac. & De Gex, 219, and 1 Phill. 105.
- (c) 3 Mont. Deac. & De Gex, 129.
- (d) 3 Mont. Deac. & De Gex, 315.
- (e) Ibid. 586.
- (g) 2 Mont. & Ayr. 348.
- (h) 1 Conn. & Laws, 559, and 2 Dru. & War. 555.
- (i) 2 Crompt. and Mees. 231.
- (k) 2 Scott N. R. 266, and 1 Mann. & Gran. 962.
- (l) 7 Mees. & Wels. 555.
- (m) 2 Hare, 249.
- (n) Post, 475.
- (o) 1 Campb. N. P. C. 82.
- (p) 12 Mees. & Wels. 655.
- (q) 1 Mau. & Sel. 255.

1845.—Thompson v. Speira.

the question whether the policy did not remain in the order and disposition of the bankrupt, in consequence of the Equitable Assurance Society not having had notice of the assignment, was argued upon *grounds wholly irrespective of the fact that, by the constitution of that society, all the assured are co-partners. That fact was not ascertained until some months afterwards; and then both parties seem to have taken it for granted that the notice of the assignment which the society had by implication of law, was sufficient to take the policy out of the order and disposition of the assignor. According to the best of my recollection, the sufficiency of the notice was not discussed.

On reconsideration, however, I am of opinion that the decision in *Duncan v. Chamberlayne* ought not to be supported; because, in order to take a policy of insurance out of the order and disposition of the assignor, it is essential to the interests of mankind, that something should be done of a decisive nature, which may effectually prevent the payment of the proceeds to any other person than the assignee. The Equitable Assurance Company is a very numerous and wealthy body, and, therefore, it would be idle to say that, because the assured happens to be a member of the company, in a legal sense, any act which he does with reference to his own particular policy, is to be taken to be a partnership act, so as to affect the whole body with notice of it. Formerly the Equitable Assurance Company used to take no notice of the assignments of their policies, but now it appears that they do.

In consequence of the decision in *Ex parte Hennessey*, by the Lord Chancellor of Ireland, I had a conversation a few days ago with his Lordship upon the subject; and we agreed that courts of equity ought to lay down some rule which should not be founded on so unsubstantial a basis as the technical doctrine of implied or constructive notice, but which should make [*474] it morally *impossible for the assignor to have dominion over the policy, without the assent of the assignee.

1845.—Thompson v. Speirs.

I have read over the case, *Ex parte Wilkinson*, in which the point arose, distinctly, before the chief judge in bankruptcy, and his Honor considered that the notice (which was the same as that in the present case) was not sufficient.

Having regard, then, to the decisions that have been made in England and in Ireland, I am bound to hold that the notice in this case was not sufficient to take the policy out of the order and disposition of the bankrupt.

The facts of the case were these :—In 1808, Mr. Brassey effected a policy in the Equitable Assurance Office; and, several years afterwards, upon the marriage of his daughter, he executed an assignment of it to Messrs. Thompson & Farr, by which one-fourth of the proceeds was settled in trust for his daughter, her intended husband, and their children. It appears that the policy was deposited, for the purpose of security, in the bank of Leas, Brassey & Farr; and as Mr. Brassey was a partner in the bank, he must have had access to the instrument. Mr. Farr, the trustee, subsequently died. The bankruptcy took place in 1835, at which time the policy remained under the dominion of the bankrupts. Subsequently some of the defendants, advisedly purchased the policy and took an assignment of it from the assignees of the bankrupts. Mr. Brassey died a short time since; and then the question arose, whether that transaction was good against the *cestui que trusts*, under the settlement.

It was quite right to bring the matter before the court; but really it was nothing more than an *assignment of [*475] a policy effected in the Equitable Assurance Office, made under such circumstances that no one can deny that, from the time of the assignment till the bankruptcy, the policy remained in the order and disposition of the bankrupt. My opinion, therefore, is, that the injunction ought to be dissolved, but without costs.

If the parties feel disposed to take the opinion of the Lord Chancellor on the case, it would be very right that they should

 1845.—In re Bromley—Ex parte Wilkinson.

do so ; as the point is of such importance, that there certainly ought to be no doubt upon it. For my own part, however, I must say that I have no doubt whatever upon the subject.

IN THE COURT OF REVIEW.

IN THE MATTER OF WM. BROMLEY, A BANKRUPT.—EX PARTE
HENRY WILKINSON.(a)

Policy of Insurance.—Order and Disposition.—Notice.—Bankrupt.

1845: 19th March.

Notwithstanding a policy of insurance may have been effected with a mutual insurance company, *express* notice of a deposit of it, by way of equitable mortgage, must be given to the company, in order to take it out of the order and disposition of the depositor.

IN May, 1842, Bromley deposited with the petitioner, Wilkinson, three policies of insurance on his life, two of which he had effected in the Rock, and the third in the Amicable Office, as a security for a debt of 4,500*l*. In January, 1844, Bromley [*476] became bankrupt, and his *assignees claimed the policies on the ground that no *express* notice of the deposit was given to the offices before the date of the *fiat*. Under these circumstances, an agreement was made between the assignees and Wilkinson, in pursuance of which the policies were sold for sums amounting to 2,050*l*. in the whole; and that sum was paid into a bank, to the joint account of the assignees and Wilkinson.

The petition insisted that, *as the Rock and the Amicable were mutual insurance companies, no notice, other than such as was incident to the deposit, was necessary with respect to any of the policies,*

(a) The reporter has been enabled, by the kindness of his friend, Mr. Bacon, to give the above statement of the case, *Ex parte Wilkinson*, which was cited in the argument and relied on in the judgment in the preceding case.

 1843.—*Elliott v. Turner.*

inasmuch as Bromley, by force of the policies, became and was a member of the companies with which they had been effected. The petition prayed that it might be referred to the commissioner acting in the prosecution of the fiat, to take an account of what was due to the petitioner, in respect of his debt, and that the proceeds of the sale of the policies, or such part thereof as, in the judgment of the court, the petitioner might be entitled to, might be paid to him, in satisfaction, so far as the same would extend, of the amount to be found due on taking the account.

Petition dismissed.

Mr. *James Russell* and Mr. *Bacon* appeared for the petition.

**ELLIOTT v. TURNER.*

[*477]

Wilful Neglect or Default.

1843: 1st June.

Neglect or default may be wilful, though it may have been unintentional, and have arisen from forgetfulness.

Covenant.

Equity will interfere in the case of a breach of covenant, notwithstanding the covenantee might not have recovered damages for it at law.

Equity will not relieve against a breach of covenant, unless the payment of money will be an adequate compensation for it.

IN 1837, the plaintiff obtained letters patent for certain improvements which he had invented in the manufacture of covered buttons. In 1840, he established the validity of his patent, in an action brought by him against one *Aston*, for infringing it.

By an indenture dated the 22d of May, 1841, the plaintiff gave license to the defendants, to use his invention, for the residue of the term, at the manufactory of *T. H. Hasluck*, in *Summer lane*, *Birmingham*, or at such other place or places as the defendants should, at any time and from time to time thereafter, upon giving such notice to the plaintiff as thereafter mentioned, think proper, they yielding and paying to the plaintiff, half-yearly, on the 24th

1843.—Elliott v. Turner.

of June and the 25th of December, as or for rent or patent dues in respect of the license, at the rate of 15l. per cent. on the net selling price of the buttons made by them according to the patent: and they covenanted, with the plaintiff, that they would, during the continuance of the license, render to the plaintiff, within one calendar month next after the 25th of March and the 29th of September in each year, a just and true account or particular in writing, (in the form contained in the second schedule to the indenture,) of the quantities, numbers and value of the buttons made by them, under the license, in the preceding half year, specifying the prices for which the same were sold, and the dates and amounts of sales, and the amount of rent or patent dues

payable in respect of the same; and that they would,
[*478] *within two calendar months next after the rendering of every such account, pay the plaintiff the sum or sums of money thereby appearing to be due; and that they would, from time to time, when thereunto required by the plaintiff, produce to him all books, accounts, &c., relating to the buttons so made as aforesaid, for the purpose of enabling him to examine and check every account so to be rendered as aforesaid; and also would give to certain persons therein named, free access and liberty to enter Hasluck's manufactory and premises, or such other manufactory whereat the patent business should be carried on for the time being, to inspect the method there used in manufacturing buttons, and the quantities and values thereof; and that, one month before they removed their business from Hasluck's manufactory in Summer lane to any other manufactory, they would give the plaintiff notice of their intention so to do, and that such notice should contain a description of such other manufactory.

Provided that, in case the defendants *should be guilty of any wilful neglect or default*, in the performance or observance of any of the covenants or agreements therein contained on their parts, it should be lawful for the plaintiff, by any writing under his hand to be delivered to them, or left at their counting-house or other usual place of business, to revoke and absolutely make void the license, and that, upon the delivery of such revocation, the license

1843.—Elliott v. Turner.

should be absolutely void to all intents and purposes. Provided always, that, in case there should be any such neglect or default as last aforesaid, but the plaintiff should not think proper to revoke the license, in pursuance of the preceding proviso, he should be at liberty to exercise such power of revocation in case of any subsequent neglect or default of *the defendants, [*479] and so, *toties quoties*, as often as any such neglect or default should be made or happen.

The bill, which was filed in May, 1843, alleged that the defendants did not, within one calendar month next after the 25th of March, 1843, render to the plaintiff a just and true, or any account or particular in writing, of the quantities, numbers and value of the buttons made by them, under the license, in the preceding half year; and that, without giving the plaintiff any notice of their intention to quit Hasluck's manufactory in Summer lane, they had removed to another manufactory of his in Princess street, Birmingham; and thereby, and by other acts and omissions mentioned in the bill, they became and were *guilty of wilful neglect or default* in the performance or observance of all or some of the covenants and agreements in the indenture or license contained on their parts; whereby the plaintiff became entitled to exercise the power of revoking the license reserved to him by the indenture; and, accordingly, on the 27th of April, 1843, he served the defendants with a notice of revocation. But, nevertheless, they continued to manufacture buttons in infringement of the plaintiff's patent right. The bill prayed, amongst other things, for an injunction to restrain the defendants from making or selling any covered buttons according to the plaintiff's invention, during the term of fourteen years granted by the letters patent; and, if necessary, that the license might be delivered up to be cancelled.

The defendants, by their answer, admitted that they did not, within one calendar month next after the 25th March, 1843, render to the plaintiff a just and true or any account or particular in writing of the quantities, numbers and value of the buttons made by them, under *the license, in the preceding [*480]

1843.—Elliott v. Turner.

half year; but they said that omission to render such account, *was accidental and unintentional on their parts*, and was occasioned by the unintentional and accidental neglect of Edward Lacey, their clerk at Birmingham, whose duty it was to have made out such account, and to have seen that the same was properly delivered to the plaintiff, within one calendar month from the 27th of March, 1843: and the defendant James Turner, who was the resident partner of the defendants' Birmingham house, said, and the other defendants believed it to be true, that James Turner, about the middle of April, 1843, told Lacey not to forget to make out and deliver the plaintiff's account, by the 25th; and the defendants fully believed that such account would have been made out and rendered in due time, as the same had been on former occasions; and the defendants did not know that it had not been delivered until the 26th instead of the 25th of April, 1843, until after the plaintiff had served his notice of revocation, dated the 29th of April; since which time the defendants had been informed by Lacey, and they believed that he had, *through forgetfulness*, omitted to make out the account before the 25th April, 1843, and that he was reminded of such omission, on that day, by receiving an account from the plaintiff which he was bound to render to the defendants within one calendar month after the 25th of March, 1843; and, accordingly, Lacey forthwith proceeded to make out the account of the defendants, and, on the following day, caused such account to be delivered to the plaintiff; and such account, although not in the form pointed out by the second schedule to the deed of license, was in the same form as the accounts which had been before rendered to the plaintiff by the defendants, under their license deed, and which the plaintiff had accepted, adopted, approved of and acted upon [*481] by *investigating the same, and, afterwards, receiving the amount of license dues appearing thereby to be due to him; and the plaintiff never, as the defendants believed, objected to the form of such accounts, but, on the contrary, at all times, expressed himself satisfied therewith: that, *by the terms of the deed, the moneys which, by the account so rendered to the plaintiff on the 26th instead of the 25th of April, 1843, were due from the defendants, were not payable by them until the 24th June then next,*

1843.—Elliott v. Turner.

and that, therefore, the plaintiff had not sustained any damage or injury whatsoever, by reason that the account was unintentionally omitted to be delivered to him until the 26th of April, 1843; and, as to the form of the account, the defendants submitted and insisted that, although the same was not according to the form contained in the second schedule to the license deed, yet the plaintiff had assented to the account being delivered in such form, by having received and acted upon the former accounts of the defendants which were delivered in the same form; and they denied that they intended, in any way, to commit a breach of the covenant contained in the deed, by delivering the account in a form different from that described by the deed: but the same was adopted as being more convenient, and from having been, on former occasions, assented to by the plaintiff as before stated.

With respect to the other breach of covenant before mentioned, the defendants said that Hasluck, in November, 1842, purchased certain premises in Princess street, Birmingham, and had possession thereof about Christmas following; and that, for several months before, he had been making arrangements for removing his manufactory from Summer lane to Princess street: that he was a manufacturer of all kinds of covered buttons, *and employed upwards of two hundred workmen; and [*482] the removal of his business from Summer lane to Princess street, had been and was notorious in Birmingham, and had been for sometime, as the defendants believed, well known to the plaintiff: that, *unintentionally and through forgetfulness* of the terms of the covenant in that behalf contained in the license deed, they omitted to give the plaintiff the required notice of Hasluck's intended removal: but they submitted and insisted that such omission *had produced no injury to the plaintiff*; and that, even if it should be deemed a breach of covenant at law, it would not and ought not to operate, in a court of equity, as a forfeiture of the license; for the object for which such notice was required to be given, was that the inspectors named in the license deed, might have the means of access to the manufactory, so as to see the mode of manufacture adopted by Hasluck; *but the plaintiff had never required that any of the inspectors should exercise such*

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right at either of the manufactories; but such access would have been given immediately, if the same had been required.

Mr. *Bethell* and Mr. *Campbell* for the plaintiff, now moved for an injunction according to the prayer of the bill.

Mr. *Stuart* and Mr. *W. T. S. Daniel* appeared for the defendants.

THE VICE-CHANCELLOR:—I must say that this appears to me to be as clear a case upon the answer as I almost ever saw.

The deed of license contains a covenant that the Turners [*483] would, during the continuance of the license thereby granted, render to the plaintiff, his executors, administrators and assigns, within one calendar month next after the 25th day of March and the 29th day of September in each year, a just and true account or particular in writing, &c.; and, lastly, it contains a covenant that the Turners shall and will, within one calendar month previous to their commencing to use or exercise the invention for which the aforesaid letters patent were granted, at or upon any other manufactory than the present manufactory of Thomas Hinton Hasluck, situate in Summer lane, Birmingham, give to the plaintiff, his executors, administrators or assigns, or leave at his or their usual place of abode, notice in writing under their hands, &c. And then it is provided that, in case the said William Hammond Turner, James Turner and Henry Turner, their executors or administrators, should be guilty of any wilful neglect or default in the performance or observance of all or any of the covenants or agreements contained therein on the part of the said William Hammond Turner, James Turner and Henry Turner, their executors or administrators, then and in any such case, it should and might be lawful for the plaintiff, his executors, administrators or assigns, by any writing under his or their hand or hands, to be delivered to the said W. H. Turner, J. Turner and H. Turner, their executors or administrators, or left at their counting-house or usual place of business for the time being, to revoke and absolutely make void the license.

1843.—*Elliott v. Turner*.

Now I apprehend that, in the view of a court of equity, where there has been a breach of covenants such as are contained in this deed of license, where recompense cannot be made by payment of money, the *court does not interfere to [*484] relieve the party from the breach he has committed.

In the case of *Reynolds v. Pitt*,^(a) that question was very much discussed. It first came before Sir W. Grant, and afterwards, on appeal, before Lord Eldon; and Lord Eldon went, very laboriously, through a long series of cases, in order to show that this court will not relieve, except in a case where payment of money may be a compensation for the default that has taken place. In that case the covenant was to insure, and, there having been a breach of the covenant, the lessor brought an ejectment: and it was held that the insurance after the breach had been committed, could have no effect whatever in curing the breach.

With respect to what has been said, namely, that this court ought not to act upon the breaches which have taken place, because, if an action or actions were brought, damages might not be recovered, I have to observe that that is not the rule of this court; because I can easily conceive that, in a case like *Reynolds v. Pitt*, if the insurance ought to have been made on the Wednesday and was not, and an insurance was made on the Thursday, if an action had been brought on the covenant, the jury might take into their consideration that the insurance on the Thursday, when no fire had happened on the Wednesday, was as good as an insurance on the Wednesday; and might, perhaps give no damages.

Now let us consider what has taken place in this *case. [*485] It is admitted that the account which, according to one of the covenants in the deed of license, the defendants ought to have rendered to the plaintiff on the 25th of April, 1843, was not delivered until after that day; and that the notice which, according to another of the covenants, they ought to have given to the plaintiff, of their intention to use his invention at another

(a) 19 Ves. 134.

1843.—Elliott v. Turner.

manufactory than that mentioned in the deed, was not given at all. The defendants, by way of defence to the relief sought by the plaintiff, allege that those breaches of covenant were accidental and unintentional on their parts, and that the plaintiff has not sustained any damage thereby. In my opinion, however, the defence so made, affords no ground whatever for this court's refusing to interfere on behalf of the plaintiff, provided he was authorized by the terms of the deed to revoke the license. In order to determine that question, it is necessary to determine what is the meaning of the word "wilful;" for the right to revoke the license was to arise only in case the Messrs. Turner should be guilty of any wilful neglect or default in doing any of the acts which they had covenanted, simply and conditionally, to do. In my opinion the word "wilful," can have no other meaning than "spontaneous:" and, if the neglect or default in this case arose from the voluntary act of the parties, either awake or asleep with reference to their rights and interests, and did not at all arise from the pressure of external circumstances over which they could have no control, I apprehend that the neglect or default was wilful. I must observe, with very great deference to so great a person as Lord Erskine, that, in my opinion, he has not quite correctly defined wilfulness: (a) because, according [*486] ing to him, unless there is an active consciousness all along accompanying the act, there is nothing wilful. Therefore, there might be the most stupid neglect of the covenants contained in a lease or any other instrument similar to the one now before me; and then, because there was not an active consciousness all along, that the party was doing wrong, or was not doing that which he was bound to do, it would not be held to be wilful. I cannot think that that is the meaning of the word.

Now these defendants, in their answer, say: that Mr. James Turner, who is the resident partner of their Birmingham house, did, about the middle of April, 1843, tell their clerk, Edward Lacey, not to forget to make out and deliver the plaintiff's account by the 25th; and that the defendants fully believed that

(a) His Honor did not mention the case in which the definition was given.

1843.—Elliott v. Turner.

such account would have been made out and rendered to the plaintiff in due time, as the same had been on former occasions; and that the defendants did not nor did any of them know that the account had not been delivered until the 26th instead of the 25th of April, until after the plaintiff had served his notice of revocation of the 27th of April, since which time the defendant James Turner had been informed by Lacey, and which information the other defendants believed to be true, that Lacey had, through forgetfulness, omitted to make out such account before the 25th of April; and that he was reminded of such omission on the 25th of April, by receiving, on that day, an account from the plaintiff, of the several articles sold by him under his tissue license; and which account, by the terms of that license, he was bound to render to the defendants within one calendar month after the 25th of March, 1843; and, accordingly, Lacey, as the defendants had *been informed and believed, [*487] forthwith proceeded to make out the account of the defendants pursuant to their license, and made out and completed the same forthwith. And then the answer goes on to state that on the following day, namely, on the 26th of April, Lacey caused the account to be delivered. It seems, therefore, that the omission to deliver the account on the 25th of April, arose from the forgetfulness of Lacey: but the utter want of care, on the part of the defendants, to see that that thing which Lacey was told to do, was performed according to their order, is left wholly unaccounted for. I must say that the neglect of the clerk, was the neglect of the partners, if the partners chose to rely on the clerk to do that which they were bound to do. And it is clear to me that there was a wilful default, with respect to delivering the account in time; for the defendants were not acted upon by any external circumstances. They might have delivered it if they had pleased; there was nothing to prevent them from doing so. There was, on their part, spontaneous, and, therefore, wilful negligence.

Then, with respect to the other breach of covenant. They say: "they have been informed and believe that Thomas Hinton Hasluck, in November last, purchased certain premises in

Princess street, Birmingham; and that he had possession thereof about Christmas last; and that, for several months last past, he has been making arrangements for removing his manufactory from Summer lane to Princess street: that the said T. H. Hasluck is a manufacturer of all kinds of covered buttons, and employs, in his business, a considerable number of workpeople, (upwards, as the defendants believe, of 200;) and such removal has been and is notorious in the town of Birmingham, and [*488] has been, *for some time, as the defendants believe, well known to the plaintiff." But the fact that the plaintiff might, *alunde*, have had knowledge of the circumstance, did not release the licensees from their express obligation to give him the notice stipulated.

Although it may be perfectly true that, if the plaintiff, instead of giving the notice of revocation, which, by the terms of the license deed he was authorized to give, had brought an action against the defendants, he might not have recovered damages; yet, I apprehend that, according to the principles of a court of equity, that circumstance has nothing whatever to do with his right to determine the license.

And as the answer clearly admits that the breaches of covenant alleged by the bill, have been committed; and as it is not disputed that the plaintiff has exercised his right to revoke the license, in the manner pointed out by the deed, it seems to me to follow, as a matter of course, that I must take it that the license is determined; and, if the license is determined, it cannot be competent to the former licensees, to be carrying on the business as if the license were still in existence. And my opinion, therefore, is that the injunction that is asked, ought to be granted.

1843.—The Marquis of Hertford v. Suisse.

*THE MARQUIS OF HERTFORD v. SUISSE. [*489]

New Orders of May, 1845.—Practice.—Appearance.

1845: 4th and 8th November.

An appearance cannot be entered for a defendant to an amended bill, under the 29th order of May, 1845, where the subpoena has been served upon his solicitor.[1]

THE defendant, after answering the original bill, went to reside abroad. Subsequently, the plaintiff amended his bill, and, in August, 1845, served the subpoena to appear to and answer the amended bill, on the defendant's solicitor, under the 20th general order of 3d April, 1828, and the 31st general order of 26th October, 1842.

No appearance having been entered for the defendant,

Mr. Schomberg, on the 4th of November, 1845, moved for leave to enter an appearance for the defendant under the 29th general order of the 8th May, 1845. He admitted that the case was not within the words of that order, but submitted that it was within the spirit of it when taken in connection with the 26th order of the same date.

The VICE-CHANCELLOR, after having conferred with the Master of the Rolls and Vice-Chancellor Wigram, held that the case was omitted to be provided for by the last mentioned orders, and refused the motion.

[1] Overruled. 1 Mc. & G. 246; and also, *con.*, *Sewall v. Goddards*, 1 De G. & S. 126; overruled.

1845.—*Feltham v. Clarke.*

[*490] *WALKER v. HURST.—RICHARDS v. JAMES.—INMAN
v. HOLDEN.

New Orders of May, 1845.—Practice.—Appearance.

1845: M. T.

Where the subpoena to appear and answer had been served in August, 1845, the court refused to allow an appearance to be entered under the 29th order of May, 1845, on a motion without notice.

IN these causes the subpoenas to appear and answer, had been served in July and August, 1845, and, consequently, several weeks before the new orders of the 8th of May, 1845, came into operation. During Michaelmas Term following, applications were made for leave to enter appearances for the defendants in the causes, under the 29th of those orders.

THE VICE-CHANCELLOR, after consulting the Master of the Rolls and Vice-Chancellor Wigram, refused the applications, and said that either new subpoenas must be served, or the applications must be made upon notice.

THE motions were made by Mr. Tillotson, Mr. Hislop Clarke and Mr. Simons

[*491]

*FELTHAM v. CLARKE.

New Orders of May, 1845.—Practice.—Service of Copy Bill.

1845: 15th November.

Memorandum of serving copy bill, allowed to be entered after the orders of May 1845, were in operation, although the service would have been bad, if made after those orders took effect.

ON a motion made by Mr. Shapter, for leave to enter a memorandum of the service of a copy of the bill in this cause, under the 24th order of 26th August, 1841, it appeared that the bill was filed on the 11th of June, 1845, and that the copy of it was

 1845.—*Lovell v. Blew.*

served on the 16th of October following, and consequently, not within twelve weeks from the filing of the bill.

THE VICE-CHANCELLOR granted the motion, saying that the second article of the 16th order of May, 1845, did not apply, because the copy of the bill was served before the day on which the orders of May came into operation, and that what was good prior to that day remained so.

*LOVELL v. BLEW.(a)

[*492]

New Orders of May, 1845—Practice.—Subpœna to rejoin.—Dismissal.

1045: 27th November.

Replication filed in July, 1845; in November following, defendant moved to dismiss.

After notice served, but before motion made, plaintiff filed subpœna to rejoin: Held that, though the replication was filed before the new orders of May, 1845, took effect, the filing of the subpœna to rejoin was a nullity, under the 93d of those orders; but the court refused to grant the motion; and ordered a fresh replication to be filed without delay.

ON the 8th of July, 1844, the plaintiff filed a replication without serving a subpœna to rejoin. On the 10th of November, 1845, the defendant served a notice of motion to dismiss for the 13th. On the 12th, the plaintiff served a subpœna to rejoin.

Mr. *Schomberg*, on this day, moved to dismiss pursuant to the notice; and submitted that the subpœna to rejoin was a nullity, as it was abolished by the 93d order of May, 1845; and that, if the plaintiff undertook to speed, publication must be ordered to pass on the expiration of two months from the 28th of October, 1845; as, under the new orders, the replication must be considered to have been filed on that day.

Mr. *Craig*, for the plaintiff, contended that all the proceedings

(a) *Ex relations.*

1845.—Routledge v. Gibson.

in the suit, must be regulated by the old practice, and that the subpoena to rejoin was regular; and that the M. R. had decided that the 93d order of May, 1845, applied only to cases where the replication had been filed since the new orders of that date came into operation.

THE VICE-CHANCELLOR said that he did not think that the M. R. could have so decided; as the 93d order plainly directed that no subpoena was to be thereafter issued; and that it [*493] was wrong to issue it in the present *case: that the proper course was to file a fresh replication, and then the cause would proceed according to the directions pointed out by the new orders. His Honor refused to give the defendants their costs of the motion, and ordered the replication to be filed on the next day.

ROUTLEDGE v. GIBSON.

Practice.—New Orders of May, 1845.—Dismissal.

1845: 4th December.

In this case replication was filed on the 4th of April, 1845, and no proceeding in the cause have been since taken,

Mr. *Simons*, for the defendant, moved, before Vice-Chancellor Wigram, under the old practice as it existed prior to the orders of April, 1828, to dismiss the bill for want of prosecution.

Mr. *Hubback* was instructed to appear for the plaintiff, and to undertake to speed.(a)

His Honor refused to grant the motion, but ordered the plaintiff to file a fresh replication.

(a) The undertaking to speed is abolished by the new orders of May, 1845.

REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
HIGH COURT OF CHANCERY,
BEFORE THE
VICE-CHANCELLOR.

*BAILEY v. FORD.

[*495]

Partnership Dissolution.—Motion.

1843: 10th June.

The affairs of a partnership being embarrassed, and daily growing worse, the court, *on motion*, appointed a person to sell the business and wind up the affairs of the partnership.

THE object of this suit was to put an end to a partnership in the business of a chemist and druggist, which had existed between the parties since some time in 1839, and was intended to continue for twenty-one years. It appeared that the partnership was insolvent, and that its embarrassments were daily increasing. Under those circumstances,

Mr. *Bethell* and Mr. *Stinton*, on the coming in of the answer, moved, on behalf of the plaintiff, that a proper person might be appointed to sell the business, to collect the debts, and to satisfy the demands upon the partnership.

Mr. *Prior*, for the defendant, said that the plaintiff was, in effect, asking the court to do on motion, what could not be done

 1843.—Hughes v. Evans.

except at the hearing of the cause, namely, to put an end to the partnership. *Oliver v. Hamilton*, (a) *Chapman v. Beach*. (b)

[*496] *The VICE-CHANCELLOR:—Although the general rule is that the court will not grant, on motion, that relief which ought to be granted at the hearing, yet it will do so in some cases. It appears that the affairs of the partnership are daily growing worse, and there is no reason to infer, from what is stated in the defendant's answer, that they will ever improve. Under the circumstances, I shall make an order in the terms of the notice of motion.

(a) 2 Anstr. 453.

(b) 1 Jac. and Walk. 594.

HUGHES v. EVANS.

Resulting Trust.—Heir and Devisee.—Will.—Construction.—Trust.

1843: 10th June.

Testator devised all his freehold estates to his most dutiful and respectful nephew E. E., "upon the trusts and for the uses following;" but did not declare any use or trust except as to one of his estates: Held, from the context of the will and a codicil thereto, that there was no resulting trust in favor of his son and heir, as to any part of his estates.

JOHN EVANS, by his will dated the 15th of April, 1824, gave devised, limited and appointed all his messuages, lands, hereditaments and premises, both freehold and leasehold, in the counties of Carnarvon and Anglesey, and all his other real estates: "Unto my most dutiful and respectful nephew, Evan Evans, attorney at law, his heirs and assigns forever, upon the trusts and for the uses following, that is to say, in trust that he shall and will permit and suffer Miss Mary Owen, now taking care of my house, and her assigns, to have, possess and enjoy the messuage, lands, orchards and plantations called *Helen Bank*, which I give and devise to her for and during the term of her natural life. I do hereby direct that they, the said Evan Evans and Mary Owen,

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shall and may live in my dwelling-house in the town of Carnarvon^(a) as long as they shall think *prudent, [*497] and have the use of the furniture therein; the said Evan Evans having the exclusive and separate use of all the offices: but, if they think it more to their advantage to go to separate lodgings, that they may set the house, ready furnished, for their joint benefit, for two years; then they may sell the household furniture and all effects therein, for their joint benefit, except the law and other books, which I give to him, the said Evan Evans, alone. *I hereby direct the said Evan Evans, his heirs, executors or administrators, to pay to her, the said Mary Owen, for and during the term of her natural life, as a compensation for the great care she has taken of my house and attention to my person during illness, over and above the before mentioned devise and bequests, the sum of 50*l.* per annum out of the rents of my real estates or the profits of my quarries at Cilguyn and Cefndu. I hereby also direct him, the said Evan Evans, to pay to the son and two daughters of my sister Ann, the sum of 100*l.* each, from and out of my real estates or the profits of my quarries. I give and bequeath unto him, the said Evan Evans, all my interest in the quarries at Cilguyn and Cefndu; and I give and bequeath unto him, the said Evan Evans, all the rest, residue and remainder of my personal estate and effects, of what nature or kind soever and wheresoever to be found at the time of my death, subject to the payment of my just debts, funeral expenses, and the probate of this my will: and, in case of any deficiency in payment of my just debts out of my personal estate as aforesaid, then I direct him, the said Evan Evans, his heirs and assigns, to sell my real estate in the county of Anglesey, and detached parts of my estates in the county of Carnarvon, reserving my Treflan estate purchased from Sir Watkin Williams Wynne and also Helen Bank, to and for the uses hereinbefore mentioned. I *recommend the pur- [*498] chased commons to be first sold, if necessary: and I do hereby nominate and appoint him, the said Evan Evans, and Mary Owen, executor and executrix of this my last will and tes-*

(a) This was a leasehold house.

 1843.—Hughes v. Evans.

tament. *I leave that most undutiful son unprovided for, for his most infamous conduct to me upon all occasions, which I do as a public example to all other undutiful children. I give and devise unto him, the said Evan Evans, his heirs and assigns, all such freehold estates in fee as I am now entitled to in trust for any person or persons, to enable him, the said Evan Evans, his heirs and assigns, to assign over such my estate and interest as the person or persons entitled thereto may direct and appoint."*

The testator, by a codicil dated 12th September, 1824, gave a messuage and lands in the county of Carnarvon, which he had then lately purchased, to his nephew Evan Evans, his heirs and assigns, forever.

He made another codicil, dated the 12th of June, 1827, in the following words: "Whereas my unfortunate son is confined in a lunatic asylum for a second time, and not likely ever to be fit or safe to be set at liberty, *I, therefore, do hereby order and direct that my nephew and executor of my last will and testament, Evan Evans, his heirs, executors or administrators, shall and do support my son* in any asylum he may be placed at during the term of his natural life; but if, contrary to expectation, he should be set at liberty, *I direct the said Evan Evans, his heirs, executors or administrators, to allow to him, my said son, the sum of one guinea per week, for maintenance, and 20*l.* per annum, for clothing, provided he does not come into the counties of Carnarvon and Anglesey; and also particularly, that he has no intercourse whatever with that infamous girl, Sally; for, if he has, in any*

[*499] **instance, any intercourse or communication with her, the last mentioned allowances are to forever cease. And, to show my determination that my son is never to enjoy one acre of my real estate, I do hereby direct that, if the said Evan Evans is ever persuaded, by any person or persons, to give up any part of my real estate, I hereby annul all my devises to the said Evan Evans; and I give and devise all my real estate to Ellis Griffith, son of my sister Ann, his heirs and assigns forever. I give and devise my new dwelling-house, with the appurtenances, now building in Caemaecglas,*

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unto Miss Mary Owen and her assigns, for and during the term of her natural life, and, from and immediately after her death, I give and devise the same to the said Evan Evans, his heirs and assigns forever. I give and bequeath, to the son and two daughters of my sister, Ann, the sum of 200*l.* each. *I recommend, to the said Evan Evans, to get the eldest son of his sister, the wife of Owen Owens, well educated and brought up to the law. In every other respect I do hereby confirm my last will and testament."*

As the testator had devised all the freehold estates which he was seised of or entitled to at the date of his will, to his nephew: "upon the trusts and for the uses following," but had declared no trust or use of any part of them, except his messuage, lands, &c., called Helen Bank, the question was whether there was not a resulting trust for his son and heir, as to all his estates, subject, with respect to the messuage, lands, &c., at Helen Bank, to the life interest of Mary Owen therein under the will.

Mr. Wakefield, Mr. Bethell, Mr. Stuart, Mr. Koe, Mr. Anderdon, Mr. Renshaw and Mr. Tillotson, for the plaintiffs and some of the defendants, whose interest it was to contend that there was no resulting trust, said that it **was* apparent, on [*500] the face of the will and codicils, that the testator intended to benefit Evan Evans, whom he spoke of in terms of favor and affection, and to disinherit his son, with whom he expressed himself to be greatly offended: that the testator, by his second codicil, had made a provision for his son, and had imposed it as a *personal* burden on his nephew, to whom he had devised his real estates; which was a further indication that he intended his nephew to take the property given to him, beneficially and absolutely: that, consequently, there was sufficient in the will and codicils to rebut any resulting trust in favor of the son and heir: that the words: "upon the trusts and for the uses following," meant nothing more than: "*subject to the trusts and uses following.*" *King v. Denison*, (a) *Cunningham v. Mellish*, (b)

(a) 1 Ves. & Beam. 260. See 272 and 273.
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(b) Prec. Ch. 31.

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North v. Compton, (a) *Dawson v. Clark*, (b) *Hill v. The Bishop of London*. (c)

Mr. Wood, for the testator's son and heir, said that, when an estate was devised subject to certain charges, the devisee took the estate beneficially, subject to the charges: but where, as in the present case, it was devised upon certain trusts, the devisee was a trustee, for the heir, of so much of the estate as was not required for the purposes of the trusts; and that *King v. Denison* supported that proposition: that the testator had given a certain part of his estates to his nephew beneficially, which circumstance not only did not tend to rebut the resulting trust as to the rest of his estates, but was strongly in favor of it: that the [*501] testator, when he made his will, might have intended to declare trusts, by a codicil, which would have exhausted the whole beneficial interest in the estates devised, by his will, to his nephew; and that he had done so partially; for, by his second codicil, he had given fifty guineas a year to his son: that *Coningham v. Mellish* was contrary to all the cases that had been since decided on the subject of resulting trusts; and that there was nothing in the will to raise a necessary implication that the testator intended his nephew to take the whole of the beneficial interest in the estates comprised in his will, that was undisposed of; and that nothing but express declaration or necessary implication was sufficient to rebut the resulting trust for the heir. *Johnson v. Telford*, (d) *Randall v. Bookey*, (e) *Kellet v. Kellett*, (g) and *Tregonwell v. Sydenham*. (h)

THE VICE-CHANCELLOR:—Upon consideration of the whole of the will, I am of opinion that the heir is excluded from taking anything by virtue of a resulting trust; and that, subject to the devise in favor of Miss Owen, the testator intended his nephew, Evan Evans, to take the whole of his estates, beneficially.

(a) 1 Ch. Ca. 196.

(b) 15 Ves. 409, and 18 Ves. 247.

(c) 1 Atk. 618.

(d) 1 Russ. & Myl. 244.

(e) 2 Vern. 425, and Prec. Ch. 162.

(g) 3 Dow, 248.

(h) Ibid. 194.

I infer, from the will, that the testator was an attorney; for, though there is some confusion, there is, also, some propriety of language in it.

In disposing of his real estates, he uses the words: "give and devise;" and in disposing of his personal estate, he uses the terms: "give and bequeath."

*First he gives and devises, and, by virtue of the powers contained in the several conveyances of such parts of his estates as had been conveyed to him, he appoints all his freehold and leasehold estates, to his most respectful and dutiful nephew, Evan Evans, his heirs and assigns forever: "upon the trusts and for the uses following; (that is to say,) in trust that he shall and will permit and suffer Miss Mary Owen and her assigns, to have, possess and enjoy the messuage, lands, orchards and plantations, called Helen Bank; which I give and devise to her for and during the term of her natural life." In this part of his will the testator has used superfluous words; for he first makes what, in terms, is a declaration of trust, but, in fact, is a limitation of a use, as to a portion of his estates, in favor of Miss Owen; and then he makes a direct devise of that portion to her for her life. He then directs that his nephew and Miss Owen shall live in his dwelling-house, in the town of Carnarvon, as long as they shall think prudent, and have the use of the furniture therein; but, if they shall think it more to their advantage to go to separate lodgings, that they may set the house, ready furnished, for their joint benefit for two years, and then sell the furniture and effects therein for their joint benefit, except the law books, which he gives to his nephew alone. In this part of the will, there is neither a declaration of trust nor a limitation of a use; for it refers to leasehold and pure personal property. [*502]

The testator then proceeds: I hereby direct the said Evan Evans, his heirs, executors or administrators, to pay to the said Mary Owen, for and during the term of her natural life, as a compensation for the great care she has taken of my house and attention to my person during illness, over and above

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[*503] the before *mentioned *devise and bequest*—(these last words show how accurate the testator was; for, in the previous part of his will, he had made a devise as well as a bequest to Miss Owen)—“the sum of 50*l.* *per annum*, out of the rents of my real estates, or the profits of my quarries at Cilguyn and Cefndu: I hereby also direct him, the said Evan Evans, to pay to the son and two daughters of my sister Ann, the sum of 100*l.* each, from and out of my real estates or the profits of my quarries.” There the direction is to Evan Evans, his heirs, executors or administrators, to pay the annuity of 50*l.* and the two sums of 100*l.* each; and he gives him and them the option to pay those sums either out of the rents of his real estates, or out of the profits of his quarries; which implies that Evan Evans was to have the rents of his real estates, as well as the profits of his quarries, which he gives to him in the very next sentence.

The testator then says: “And I give and bequeath unto him, the said Evan Evans, all the rest, residue and remainder of my personal estate and effects, of what nature or kind soever and wheresoever to be found at the time of my death, subject to the payment of my just debts, funeral expenses, and the probate of this my will.” And then, in case of any deficiency in payment of his debts out of his personal estate, he directs Evan Evans, his heirs and assigns, to sell his real estate in the county of Anglesey, and the detached parts of his estates in the county of Carnarvon, reserving his Treflan estate, purchased from Sir Watkins Williams Wynn, and also Helen Bank, to and for the uses thereinbefore mentioned. Now who was to reserve the estates that were not to be sold? Why Evan Evans, the party to whom they were given; and he was to reserve them:

[*504] “to and for the uses hereinbefore mentioned.” *The truth is that no use had been before declared, except, with respect to Helen Bank, for the life of Miss Owen.

Then, after recommending the purchased commons to be first sold, if necessary, and appointing Miss Owen and Evan Evans the executrix and executor of his will, comes the clause decla-

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ring that he left his most undutiful son unprovided for, for the reason which he mentions. I admit that that clause would not, of itself, prevent the heir from taking the real estates by descent: but, as the testator has, in the preceding part of his will, given his real estates away from his heir, it is, surely, to be taken into consideration when we have to determine what was his intention in making that previous gift. And as the testator has given all his real estates to Evan Evans, in the first instance, with a declaration of use, as to a certain part of them, for Mary Owen, for her life; and has directed Evan Evans and his heirs to pay certain sums out of the rents of those estates, and to sell a portion of them in case his personal estate should be insufficient to pay his debts, and to reserve the remainder for the uses therein-before mentioned; and as he has further declared that he left his son and heir unprovided for, my opinion is that he intended the gift to Evan Evans to be a beneficial gift.

The testator concludes his will by making an express devise, to Evan Evans, of all the freehold estates in fee to which he might be entitled in trust for any person or persons, to enable him to assign over the same, as the person or persons entitled thereto might direct or appoint. That devise affords some slight inference that he intended Evan Evans to take beneficially, under the *prior gift, all the other real estates of [*505] which he was seised. It was inserted with a view to prevent any misconception as to the effect which he meant the prior gift to have.

Nothing turns on the first codicil; but the second affords very strong, if not conclusive evidence, that the testator intended Evan Evans to take, for his own benefit, the estates devised by the will. He directs that his nephew and the executor of his last will and testament, Evan Evans, his heirs, executors or administrators, shall support his son (who, it seems, was then under confinement as a lunatic) in any asylum in which he might be placed during the term of his natural life; but, if his son should be set at liberty, then that Evan Evans, his heirs, executors or administrators, shall allow him the sum of one guinea per week,

1843.—Hughes v. Evans.

for maintenance, and 20*l.* *per annum*, for clothing, on certain conditions. Those directions were given, unquestionably, with reference to the will and to what had passed under it. They impose a charge on Evan Evans, personally, in respect of the property devised to him by the will; and, therefore, show of themselves, that what was given to him by the will, was given beneficially.

The testator then, in case Evan Evans should be persuaded to give up any part of his estates, (which implies that he might give up the whole,) annuls all his devises to him, the said Evan Evans, and gives all his estates to the son of his sister Ann: in other words, he annuls all the devises which he had made to Evan Evans, and substitutes another taker in his place; which seems to me to remove any doubt that otherwise might have existed as to the testator's intention to benefit Evan Evans.

[*506] *He then devises a house to Mary Owen for her life, and, after her death, to Evan Evans and his heirs; and concludes by recommending Evan Evans to get the eldest son of his sister, the wife of Owen Owens, well educated and brought up to the law: and, so far as any obligation was thereby imposed on Evan Evans, it was imposed in respect of the property previously devised to him.

In my opinion this codicil shows that the interpretation which the testator put upon his own will, was that he had thereby disposed of all his real estates in favor of Evan Evans, except that he had given Helen Bank to Mary Owen for her life; and, consequently, the heir is excluded by express devise.

1843.—Cotterell v. Homer.

COTTERELL v. HOMER.

Purchase for Valuable Consideration.—Voluntary Settlement.—Limitations to Collaterals.

1843: 22d and 23d June.

By a marriage settlement, an estate, the property of the wife, was limited, in default of children of the wife, to trustees in trust to sell and divide the proceeds amongst the brothers and sisters of the wife. The husband agreed to sell the estate; and he and his wife joined in conveying it to the purchaser, by deed and fine. The wife died without issue: Held, that the limitation in favor of her brothers and sisters, was voluntary, and, therefore, void as against the purchaser.

By indentures of lease and release, dated the 4th and 5th of August, 1815, Tamar Homer, in contemplation of her marriage with Barnett Hinton, conveyed a house and piece of land, of which she was seised in fee, unto and to the use of Thomas and James Homer, their heirs and assigns, in trust, from time to time during her life, to pay the rents and profits to such person or persons as she, notwithstanding her coverture, should, by her *will(a) appoint, to the intent that the same [*507] might not be at the disposal of, or subject to the control, debts or engagements of B. Hinton, her then intended husband, but only at her own sole and separate disposal; and, in default of and until such appointment, to her proper hands: or, otherwise, to permit her to receive the same for her separate use; and upon further trust to dispose of the house and land unto such person or persons, and for such estate or estates, and in such manner as she, notwithstanding her coverture, by her will or any writing purporting to be her will, should appoint; and, in default of such appointment, to and amongst such of her children as should be living at her decease, share and share alike, and their heirs; but, in case there should be no such child, and no previous disposition made thereof, then to Barnett Hinton for his life, and, after his decease, upon trust that the house and land should be sold by Thomas and James Homer, and the money arising therefrom be divided equally amongst the brothers

(a) *Sic in brief.*

1843.—Cotterell v. Homer.

and sisters of *Tamar Homer* then living, and the issue of such of them as should be dead.

By an indenture dated the 12th of January, 1827, B. Hinton and Tamar, his wife, in consideration of 150*l.* lent to them by Joseph Harper, demised the house and land to Harper, for one thousand years, subject to redemption on payment by Hinton and his wife, or either of them, their or either of their heirs, executors or administrators, of 150*l.* with interest: and Hinton, for himself and his heirs, and for his wife, covenanted with Harper that he and his wife (she thereby consenting) or her heirs, would levy a fine *sur conuzance de droit come ceo, &c.*, with proclamations, of the house and land, to the use of Harper, his executors, &c., for *the term of one thousand years, but subject to the proviso for redemption, and subject thereto, and the reversion, equity of redemption and inheritance depending thereon,^(a) to the use of B. Hinton, his heirs and assigns: and, not long afterwards, a fine was levied in pursuance of that covenant.

By an indenture of the 11th of March, 1828, Hinton, for himself, his heirs, executors, &c., covenanted with Harper, his executors, &c., that the house and land should, during the term of one thousand years, stand charged with the sum of 300*l.* then lent to him by Harper, with lawful interest for the same, as well as with the 150*l.* and the interest thereof.

In November, 1828, the plaintiff paid the 450*l.* to Harper; and, in consideration thereof, Hinton and his wife, by an indenture, dated the 7th of that month, assigned the house and land to the plaintiff, for the residue of the term, subject to redemption, on payment by Hinton and his wife, their heirs, executors, administrators or assigns, to the plaintiff, his executors, &c., of the 450*l.* with legal interest.

By indentures of lease and release of the 16th and 17th of October, 1829, made between Hinton and his wife of the one part,

(a) *Sic.*

1843.—Cotterell v. Homer.

and the plaintiff of the other part, after reciting that *the plaintiff had contracted with Hinton*, for the purchase of the fee simple of the house and land, at the sum of 570*l.* including the principal and interest due on the mortgage to the plaintiff, Hinton and his wife, in consideration of the 570*l.* paid to him by the plaintiff, conveyed the house and land to the *plaintiff, [*509] his heirs and assigns, freed from all equity of redemption whatsoever; and Hinton, for himself and his wife (she consenting thereto) covenanted, with the plaintiff, that he and his wife would levy a fine *sur conuizance de droit come ceo, &c.*, with proclamations, of the house and land, to the use of the plaintiff, his heirs and assigns: and, in Michaelmas Term in the 10th of Geo. IV, a fine was levied accordingly.

Mrs. Hinton died in July, 1837, without having had any issue, and her husband died in February following.

Mrs. Hinton left a sister and several brothers, of whom James and Thomas Homer, the trustees of the settlement, were two, her surviving.

James and Thomas Homer having brought an ejectment for the house and land, against the plaintiff's tenant, the bill was filed against them and their brothers and sister, charging that *all the limitations in the settlement, which were subsequent to the limitation to Hinton for his life, were voluntary and void as against the plaintiff*, the purchaser of the house and land; and praying for a declaration to that effect, and that James and Thomas Homer might be decreed to convey the house and land to the plaintiff, or as he should direct, and that the ejectment might be stayed.

James and Thomas Homer, by their answer, submitted that the limitations in the settlement subsequent to the limitation in favor of Hinton, were not voluntary and void as against the plaintiff, and that, notwithstanding the conveyances and fines mentioned in the bill, the legal estate in the house and land was vested in them in trust to sell, and to divide the proceeds amongst themselves and the other defendants.

[*510] *The injunction having been granted, an order *nisi* for dissolving it, was obtained on the coming in of the answer; and Mr. *Walker* and Mr. *Bacon* for the plaintiff, now showed cause against that order being made absolute. They said that limitations, in a marriage settlement, for the benefit of collateral relations of the settler, were voluntary, and, therefore, void, under the 27th Elizabeth, chap. 4, against a subsequent purchaser for valuable consideration, notwithstanding he had purchased with notice of the settlement, and notwithstanding the legal estate in the property remained vested, as it did in the present case, in the trustees of the settlement. *Johnson v. Legard*, (a) *Clayton v. Earl Wilton*, (b) *Doe v. Manning*, (c) *Roe v. Mitton*, (d) *Fairfield v. Birch*, (e) and *Pulvertoft v. Pulvertoft*. (g) That *Buckle v. Mitchell*, (h) which was approved of by Lord Edon in *Metcalfe v. Pulvertoft*, (i) went further than any of the preceding cases; for it decided that a voluntary settlement was void against a subsequent purchaser who had merely contracted to purchase the settled estate: that, in this case, the plaintiff's title to the relief prayed by the bill, did not rest on contract, for he had taken an actual conveyance, from Mr. and Mrs. Hinton, by deed and fine; and, as none of the cases cited had been ever questioned, there could be no doubt that the court would, ultimately, hold his title to the estate to be unimpeachable; and, therefore, the injunction which had been granted, ought to be continued.

[*511] *Mr. *Bethell* and Mr. *Prior* for the defendants:—The argument for the plaintiff has not touched the real point in this case. We do not mean to deny that, where a man, on his marriage, makes a settlement of *his own estate*, containing limitations to his collateral relations, he may defeat those limitations by selling the estate to a purchaser. But, in this case, the

(a) 3 Madd. 283, and 6 Maule & Selw. 60; Turn. & Russ. 281.

(b) 6 Maule & Sel. 67, note, and 3 Madd. 302, note.

(c) 9 East, 59.

(d) 2 Wilson, 356.

(e) 3 Sugd. Vend. & Purch. 298.

(g) 18 Ves. 84.

(h) 18 Ves. 100.

(i) 1 Ves. & Beam. 180.

1842.—Cotterell v. Homer.

estate was the property, not of the husband, but of the wife. The husband took only a life interest in it under the settlement. He was nothing more than a grantee, to that limited extent, from his wife. All the other limitations were made for the benefit of herself, her children by any husband, and her brothers and sisters; and the legal estate still remains vested in the trustees to support those limitations. The object of the settlement was to protect the wife from the marital influence, and a court of equity will not lend its aid to defeat that object. The statute of Elizabeth enables a person to defeat a voluntary settlement of *his own* estate, by conveying it to a purchaser for valuable consideration; but it does not empower an individual who has a limited interest in property—not his own, but his wife's—to defeat by a contract made by himself, and not by his wife, any of the limitations made by her of her own property.

Mr. *Walker*, in reply, said that there was no substantial difference between the present case and the cases cited; that, if the conveyance to the purchaser had been made by the husband alone, there could be no doubt that it would have been ineffectual to pass more than his life interest under the settlement; but, as the wife had joined with her husband in levying a fine of the property, she thereby gave full and complete effect to his contract.

*THE VICE-CHANCELLOR:—There is too much subtlety in the distinction that has been made between the contract and the conveyance. [*512]

The law enables a married woman to dispose of the inheritance of her estate, either by levying a fine or by suffering a recovery of it. By adopting either of those two modes of assurance, she has as full dominion over her property as she would have had if she had been a *feme sole*; in fact she becomes, *quasi*, a *feme sole* with respect to it. And when she joins with her husband in levying a fine, in pursuance of a contract entered into by him, she must be taken to have been an actor from the commencement of the transaction; and, consequently, the contract becomes as much her act as the act of her husband.

 1843.—Osbaldiston v. Simpson.

Besides, when the estate has been once conveyed by deed and fine, you cannot separate the contract from the conveyance; for the former is swallowed up in the latter.

As the plaintiff in this case has paid his purchase money, and taken a conveyance of the estate from the husband and wife, by deed and fine, I am of opinion that he is a purchaser within the meaning of the statute of Elizabeth; and, consequently, his title must prevail against the parties claiming under the voluntary limitations in the settlement. Therefore I shall continue the injunction. I will, however, permit the defendants to take a case for the opinion of a court of law, if they wish it.(a)

(a) No case was taken.

[*513] *OSBALDISTON v. SIMPSON AND OTHERS.

Compounding a Misdemeanor.—Gaming.—9 Anne, c. 14.—Public Policy.

1843: 26th June.

Securities given by the plaintiff, to prevent a prosecution for cheating at cards, decreed to be delivered up.

THE object of the bill was to have certain promissory notes delivered up, which the plaintiff had given to the defendant Simpson, on behalf of the defendant Bowles, and which they conspiring with the other defendant Chinery, had obtained from the plaintiff, by threatening to accuse him (falsely as it was alleged) of having cheated Bowles at cards, and to sue him for the penalties for that offence, under 9 Anne, c. 14, s. 5.

The answers stated that the plaintiff had cheated Bowles by using false or cut cards, and that he consented to give the notes because he knew that he had done so; and that he had admitted, in a letter which he sent to Simpson enclosing the notes, that he was liable to penalties under the statute of Anne. But they denied that the defendants had conspired together to procure the

 1843.—*Osbaldiston v. Simpson*.

notes, or that they had used threats for that purpose. An injunction, however, restraining them from negotiating or suing on the notes, which had been granted *ex parte*, was continued on the coming in of the answers.

The cause now came on to be heard.

Mr. *Bethell* and Mr. *Cole*, for the plaintiff, cited *Williams v. Hedley*,^(a) and *Lloyd v. Gurdon*.^(b)

Mr. *Wakefield* and Mr. *May*, for Bowles, cited *Thomson v. Thomson*,^(c) *Knowles v. Haughton*,^(d) *Armstrong v. Armstrong*,^(e) *Evans v. Richardson*,^(g) and *Drage v. *Ibbotson*,^(h) in order to show that the case was one which a court of equity would not entertain, but would dismiss the bill with costs, notwithstanding it had continued the injunction. *Barfield v. Kelly*.⁽ⁱ⁾

Mr. *K. Parker* and Mr. *Shebbeare* for Simpson, said that he was merely a stakeholder, and asked that the bill might be dismissed, as against him, with costs.

Mr. *Stuart* and Mr. *Hubback* for Chinery, said that the nature of the case was such that the court would not interfere: *Ewing v. Osbaldiston*.^(k) where Lord Cottenham, C. said: "In *Bartlett v. Vinor*, Lord Holt says: Every contract made for or about any matter or thing which is prohibited and made unlawful by any statute, is a void contract, though the statute itself does not mention that it shall be so, but only inflicts a penalty on the offender; because a penalty implies a prohibition, though there are no prohibitory words in the statute." They added that, if the court would interfere, still the bill, as against Chinery, ought to be dismissed with costs, for no case had been made out against him.

(a) 8 East, 378.

(b) 2 Swans. 180. See *Nash v. Ash*, 1 Eden, 378 and 381, *note*.

(c) 7 Ves. 470.

(h) 3 Rep. N. P. C. 643.

(d) 11 Ves. 168.

(i) 4 Russ. 355.

(e) 3 Myl. & Keen, 45.

(k) 2 Myl. & Cr. 53; see 85.

(g) 3 Mer. 469.

1843.—Osbaldiston v. Simpson.

The VICE-CHANCELLOR, after observing that the charge of conspiracy had not been supported, proceeded as follows:—The bill states, in effect, that the plaintiff was induced to give the notes in consequence of his fears being wrought upon by the representations of Bowles. Bowles, in his answer, does not flinch from that statement, but admits that he thought it right to punish the plaintiff for what he had done; that is, to [*515] be an arbitrator in his own *cause, and determine, for himself, what amount of penalty the plaintiff ought to pay for his, Bowles', benefit.

If Bowles could have recovered the penalties at law, he was at liberty to do so: but it appears to me now, as it did when I continued the injunction, that it would be extremely dangerous to allow a party to be a judge in his own cause, and to determine, in his own favor, what amount of penalty ought to be paid for a breach of the law committed by another person, notwithstanding he may have suffered by it.

I think, therefore, that there is quite enough stated in Bowles' answer, to entitle the plaintiff to a decree according to the prayer of the bill, with costs.

Simpson, in his answer, submits that the plaintiff is not entitled to the relief prayed, and that the bill ought to be dismissed with costs. Therefore he interferes more than was necessary, and advocates the cause of his co-defendant Bowles. He has mixed himself up unnecessarily with the transaction; and, therefore, as to him also, there must be a decree with costs.

As Chinery does not seem to have interfered in the transaction except in an innocent way, I shall give no costs as against him. Notwithstanding his counsel have contended at the bar, that the bill ought to be dismissed, generally with costs, he, by his answer, disclaims all interest in the matters in question, and submits that the bill ought to be dismissed, *as against himself merely*, with costs.(a)

(a) Mr. Bethell had said that he did not ask for costs as against Chinery.

1843.—Solomon v. Solomon.

*SOLOMON v. SOLOMON.

[*516]

Assignment pendente lite.—Parties.—Pleading.

1843: 27th June.

Some of the plaintiffs, who had an equitable interest only in the property in question, mortgaged their interests pending the suit: Held, at the hearing, that the mortgage was a necessary party.

ABRAHAM SOLOMON being entitled to part of the real and leasehold estates of his late father, Samuel Solomon, the testator in the cause, devised and bequeathed all his real and personal estate to trustees in trust for his widow and children, and died shortly afterwards. The bill was filed, by his widow and children, to have the trusts of Samuel Solomon's will carried into execution.

Pending the suit, the widow and such of the children of Abraham Solomon as were adult, mortgaged their interests under Abraham Solomon's will, in the real and leasehold estates of Samuel Solomon, to William Bird.

On the suit coming on to be heard,

Mr. *Bethell* and Mr. *Mylne* for some of the defendants, said that the suit was defective with respect to parties, because Bird had not been brought before the court.

Mr. *Koe* for the plaintiff, cited the case of *Eades v. Harris*,^(a) in which one of the plaintiffs, who had an equitable interest in the subject matter of the suit, made an assignment of it pending the suit: and, on its being objected, at the hearing of the cause, that the assignee was not before the court, Vice-Chancellor Knight Bruce held that the circumstance of one of several plaintiffs *executing, after the institution of the suit, an instrument which merely affected that plaintiff's equitable interest, did not prevent the suit from being heard; but that it

(a) 1 You. & Coll. 230.

1843.—Parsons v. Bignold.

might be heard as if there had been no such assignment, and that those who claimed under it, must take such course, to enforce their rights, as they might be advised.

Mr. *Parker*, Mr. *Simons*, Mr. *Bacon*, Mr. *MacChristie* and Mr. *W. H. Smith* appeared for the other parties.

THE VICE-CHANCELLOR:—I do not mean to pronounce any opinion upon the decision in *Eades v. Harris*: the circumstances of which are different from the circumstances of the case now before me.

Suppose that a mortgage is made to A. in fee; and then a second mortgage, which is merely equitable, is made to B., and he files a bill to redeem, and, afterwards, assigns his interest to D.: can any person who has the slightest experience in this court, say that the suit to redeem can be maintained?

Here I find the fact that all the adult plaintiffs have parted, *pro tanto*, with the whole of their interest to a mortgagee; and my opinion is that, unless their mortgagee is made a party, the suit cannot proceed.

[*518]

*PARSONS v. BIGNOLD.

Mistake.

1843: 1st July.

An erroneous statement was made to a life insurance company, by or through their agent, as to A.'s interest in his son's life; upon which the company granted a policy to A. After the son's death, the company discovered the error and refused to pay the sum insured. A bill filed by A., to have the mistake rectified, was dismissed, because the evidence did not show, distinctly, whether the mistake arose from the agent's inadvertence, or from his having been misinformed by A.

THE plaintiff held certain copyhold and leasehold tenements, at Winscombe in Somersetshire, under the dean and chapter of Wells, for the lives of his son James Parsons and another per-

1843.—Parsons v. Bignold.

son, and certain leasehold tenements at Puxton in the same county, for different lives under Lord Wyndham: and being desirous of insuring the life of his son James, for 1,000*l.*, he went to the office of the Norwich Union Life Insurance Society at Axbridge, and, after some conversation relating to the proposed insurance had taken place between him and one Norvill, the agent for the society at that place, the latter inserted in a printed form, the age of James Parsons, and all the other particulars required by the society, to be declared by persons desirous of effecting insurances in their office, except the nature of the plaintiff's interest in his son's life; which the agent added after the plaintiff had signed the declaration and quitted his office. The declaration was transmitted to the society in London, and a policy, dated the 17th of August, 1840, was thereupon granted.

In April, 1841, James Parsons died; and the insurance society having refused to pay the 1,000*l.*, the plaintiff brought an action for it against Bignold, their secretary; to which Bignold pleaded that the nature of the plaintiff's interest in his son's life, was not correctly set forth in the declaration made by him on effecting the policy. And it appeared from a copy of that document which the plaintiff afterwards obtained, that the plaintiff was therein stated to be interested in his son's *life, [*519] in respect of a leasehold estate held under the dean and chapter of Wells, *and of another leasehold estate at Puxton, held under Lord Wyndham.*

The bill alleged that the statement relative to the estate at Puxton, was a mistake on the part of Norvill, and was inserted, by him, without the plaintiff's authority, knowledge or privity, and in his absence and after he had signed the declaration: that the plaintiff never stated to Norvill, that he had any interest, dependent on his son's life, in any property at Puxton; but, on the contrary, told Norvill that his son's life was not in the property at Puxton. The bill prayed that the mistake might be rectified, or that Bignold might be restrained from availing himself of it by way of defence to the action.

1843.—Parsons v. Bignold.

Bignold, in his answer, said that the declaration contained a false and fraudulent representation as to the state of James Parsons' health, and, therefore, the policy was void; and that he believed that the statement in the declaration relative to the plaintiff's interest, was made, not without the plaintiff's knowledge or privity, but by his direction and at his dictation. He admitted, however, that he had received a letter from Norvill, stating that he filled up the declaration after the plaintiff had signed it; that he should not have known that the plaintiff had property at Puxton, unless the plaintiff had told him so, but he could not undertake to swear that the plaintiff told him that his son's life was in that property, and that the entry to that effect, must certainly be an error on his part. The defendant added that he did not admit or believe the statements in the letter to be true, and that, if Norvill did fill up the declaration [*520] *as stated in the bill, he did so as the agent, not of the insurance society, but of the plaintiff.

The substance of Norvill's evidence in chief, was that the plaintiff must have mentioned to him the property at Puxton, otherwise he should not have entered it in the declaration, for he should not have known that the plaintiff had property there: that he filled up the declaration, about an hour after the plaintiff had signed it, from his recollection of the plaintiff's statements; but could not depose, with certainty, whether they were correctly represented therein. On cross-examination, he said that he could not swear whether or not the plaintiff told him that his son's life was in the Puxton property.

Mr. *Bethell* and Mr. *Prior* for the plaintiff, said that Norvill acted improperly in filling up the declaration after the plaintiff had signed it, and it was quite plain that he had made the mistake; but that if it had been made by the plaintiff himself, the court would have relieved against it: *Ball v. Storie*,^(a) where the court reformed an instrument at the instance of the party who drew it.

(a) 1 Sim. & Stu. 210.

1843.—*Pariente v. Bensusan*.

Mr. *Anderdon* and Mr. *Bacon* appeared for the defendant: but

The VICE-CHANCELLOR, without hearing them, said:—In the case referred to, the real intention of the parties appeared from a written instrument; and the object of the suit was to give effect to their intention as it so *appeared. But, [*521] in this case, *non constat* but that the plaintiff may have made a statement to Norvill, which fully warranted him to make the representation which he did in the declaration. The evidence does not go far enough. It does not show clearly, as it ought to have done, what it was that the plaintiff told Norvill relative to his interest in his son's life. In order to induce the court to give relief, the evidence ought to have shown that the entry made by Norvill, in the declaration, did not correspond with the statement made to him by the plaintiff.

After the policy has been granted on the footing of the statements contained in the declaration, I do not see how this court can interfere; and, therefore, the bill must be dismissed.

**PARIENTE v. BENSUSAN.*

[*522]

Injunction.—Contempt.—Practice.

1843: 13th July.

It is a breach of an injunction to stay trial, to obtain an order to change the venue in the action.

Practice.

Notwithstanding a defendant has notice of an order to amend, and for him to answer the amendments and exceptions at the same time, he may file his answer at any time before the order is served.

AFTER the common injunction had been extended to stay trial, the defendant obtained a judge's order for changing the venue in the action.

The VICE-CHANCELLOR held that he, thereby, committed a breach of the injunction.

1843.—Clogstoun v. Walcott.

On the 5th July, the plaintiff obtained an order to amend his bill, and for the defendant to answer the amendments and exceptions at the same time; but did not serve it until after four o'clock on the 7th. About one o'clock on that day, the defendant, notwithstanding he had notice of the order, filed his further answer.

The VICE-CHANCELLOR refused to direct the answer to be taken off the file, notwithstanding the notice, and although the plaintiff had been unavoidably delayed in procuring the order, owing to the offices being closed on the 6th, which was a holiday.

Mr. Bethell appeared for the plaintiff, and Mr. Cooper and Mr. Bigg for the defendant.

[*523]

*CLOGSTOUN v. WALCOTT.

Appointment.—Power.—Will.—Construction.

1843: 14th July.

Testatrix having a testamentary power of appointment in favor of her children, over certain sums of stock standing in the names of A. and B., as trustees, gave and bequeathed, and, *by virtue of every power enabling her in that behalf, appointed* all the property of or to which she was then, or, at the time of her death, should or might be possessed or entitled or have power to dispose, to A. and B., upon trust, *after payment of her debts and funeral and testamentary expenses, to invest the residue thereof, in their names, in the funds, or upon government or real security; and she then declared trusts in favor of her children.* She died possessed of personal estate more than sufficient to pay her debts and funeral and testamentary expenses: Held, that her will was not an exercise of the power.

By the settlement on the marriage of Mr. and Mrs. Clogstoun, dated the 7th of August, 1813, 3,649*l.* consols and two sums of 3,000*l.* each, Antigua currency, were assigned to E. Walcott and George Wilder, in trust, as to the two last mentioned sums, to call in and invest the same in their names, in the public funds or on real security either in England or the West Indies, to be, from time to time, varied and transposed as they should think fit; and, as to the 3,469*l.* consols, in trust, either to continue that sum in the fund in which it was then invested, or else to sell it out and invest the proceeds in their names in or upon any such

1843.—Clogstoun v. Walcott.

funds or securities, and with such power to alter, vary and trans-
pose the same as thereinbefore directed and given with respect
to the two sums of 3,000*l.*; and to stand possessed of all the trust
moneys, funds and securities, in trust for the separate use of Mrs.
Clogstoun during her life, and after her death, in trust for her
husband during his life, and after the death of the survivor of
them, in trust to pay and transfer the same to and among the
child or children of the marriage, or any one or more exclusively
of the other or others of them, at such age or ages, in such man-
ner, and if more than one, in such shares as Mr. and Mrs. Clog-
stoun should, by deed or will, jointly appoint, and in
default thereof, as the *survivor of them should, by deed [*524]
or by will signed and published in the presence of, and
attested by two or more witnesses appoint, and in default there-
of, to or amongst such child or children in manner following,
(that is to say,) if there should be but one such child, the trust
funds to vest in such only child, being a son, at twenty-one, and
being a daughter at that age or on her marriage, and to be paid
and transferred to him or her at the same age or time, if the
same should happen after the decease of the survivor of Mr. and
Mrs. Clogstoun, but if not, then immediately after the decease of
the survivor; and if there should be two or more such children,
then the trust funds were to vest in and be paid and transferred
to or among such two or more children, in equal shares, the
shares of sons to vest at twenty-one, and the shares of daughters
at that age or on marriage, and to be paid and transferred at the
same ages or times; but, if the same should happen in the life-
time of Mr. and Mrs. Clogstoun or the survivor of them, then
immediately after the decease of the survivor. The settlement
then provided for the survivorship of the shares of such of the
children as should die before their shares became vested; and it
empowered the trustees to apply one-half of the capital of each
child's expectant portion for the advancement, and one-half of
the income for the maintenance and education of that child, and
directed the trustees to accumulate the remainder of the income.

There were ten children of the marriage, three of whom died
infants and unmarried.

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The two sums of Antigua currency, were paid to Walcott and Wilder, and were invested by them, in their own names, partly in consols, and partly in three and a half per cents.

[*525] *In July, 1834, Mr. Clogstoun died intestate, and without having joined with his wife in any appointment under the settlement.

Mrs. Clogstoun died on the 20th January, 1843, having made her will, dated the 13th of August, 1840, and which was signed and published by her, and attested in the manner required to be a due execution of the power given to the survivor of her and her husband by the settlement; and she thereby gave to Walcott and Wilder 1,000*l.* sterling, in trust to invest the same in their names in the public funds or upon government or real securities, with power to vary the same for other funds and securities of the like nature; and she directed them to stand possessed of the 1,000*l.* and the funds and securities upon which it should be invested, in trust, until her daughter Augusta should attain twenty-one or marry, to apply the whole or any part of the dividends and interest for her maintenance and education, and to accumulate the surplus for her benefit, yet so, nevertheless, that the trustees might, if they should think proper at any time, apply the accumulations of any preceding year or years for her maintenance and education in any succeeding year; and after Augusta should have attained twenty-one or should marry, then to pay the dividends and interest, to her or to such person or persons as she might, but not by way of anticipation, appoint to the, intent that the same might be for her separate use, and, after her death, (subject to the exercise of the power thereafter given with reference to any husband who might survive her,) upon trust to stand possessed of the trust fund for her child or children in manner therein mentioned: and the testatrix declared that, in case there should be no child of her daughter Augusta,

[*526] who should attain a vested *interest under the trusts thereinbefore declared, then the 1,000*l.* and the funds and securities on which the same should be invested, should (subject to the life interest therein of any husband who might

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survive her) sink into *the testatrix's residuary property*: and she gave to Walcott and Wilder, the like sum of 1,000*l.* sterling, upon the same trusts and subject to the same powers for the benefit of her daughter Caroline, and her children and any husband who might survive her, as were thereinbefore contained for the benefit of her daughter Augusta and her children, and any husband who might survive her: and she declared that, in case there should be no child of her daughter Caroline, who should attain a vested interest under the trusts thereinbefore declared or referred to, then the last mentioned trust fund should (subject to the life interest therein of any husband who might survive her daughter Caroline) sink into her own residuary property.

And she gave and bequeathed, and, by *virtue of every power enabling her in that behalf, appointed* all the property of what nature soever and wheresoever, of or to which she then was, or, at the time of her death, should or might be possessed or entitled, *or have power to dispose to* Walcott and Wilder, upon trust, *after payment of all her debts, funeral and testamentary expenses, and the two legacies* of 1,000*l.*, to invest the residue thereof, in their names in the public funds or upon government or real securities in England, with power to vary such funds or securities for others of the same or the like nature; and, from time to time, until her son Edward should attain the age of eighteen years, or previously die, to apply the whole or any part of the interest and dividends of the last mentioned trust property for his maintenance and education, and to accumulate **the* [*527] surplus, and the accumulations to be added to and go along with the principal of the same property; and when the aforesaid trust for the benefit of her son should have determined, then upon trust to pay the last mentioned trust property to all her children, (including her daughters Caroline and Augusta, and her son Edward,) who, being a son or sons, had already attained or should attain twenty-one, or, being a daughter or daughters, had already attained or should attain twenty-one or been previously married, equally to be divided between them as tenants in common, and to be vested interests in them at such ages, days and times accordingly, notwithstanding the trust

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- thereinbefore contained for the maintenance and education of her son Edward: and she directed that, *after the determination of that trust, and during the rest of Edward's minority, it should be lawful for the trustees to apply all or any part of the dividends and interest of the then presumptive share of any of her said children whose shares should not then have become vested*, (including her son Edward,) for his, her or their maintenance and education, until his, her or their share or respective shares should become vested: provided that, after the determination of the trust thereinbefore contained
- for the benefit of her son Edward, prior to his attaining the age of eighteen years, or sooner as to him, it should be lawful for the trustees, during the minority of any of her sons whose shares should not be vested, to apply the whole, or such part as to the trustees should appear right, of his then presumptive share, for his advancement: and she appointed Walcott and Wilder the executors of her will.

Walcott and Wilder proved the will.

[*528] *The testatrix's assets consisted of 2,282*l.* consols, and 1,724*l.* three and a half per cents., standing in the names of Walcott and Wilder, which were more than sufficient to pay her debts and funeral and testamentary expenses and the legacies of 1,000*l.* given to her daughters Augusta and Caroline, and consequently the balance of those two sums constituted the testatrix's residuary personal estate.

In May, 1843, when the bill was filed, three of the testatrix's •children were of age. The others, namely, Samuel, Caroline, Augusta and Edward, were nineteen, sixteen, fifteen and eleven years old respectively. The six eldest were the plaintiffs in the cause, and the youngest, Edward, and the trustees, were the defendants.

The bill alleged that Edward insisted that the will was a valid execution of the power given to the testatrix by the settlement, and that he was entitled to have the dividends and interest of the funds therein comprised, and of the testatrix's residuary personal

1843.—Clogstoun v. Walcott.

estate, applied for his benefit; whereas the plaintiffs submitted that the will was not a valid execution of the power. The bill prayed that the rights of the plaintiffs and of the defendant Edward Clogstoun, under the settlement, might be declared, and, in particular, that it might be declared that the plaintiffs were entitled to maintenance out of the trust moneys comprised in the settlement; and that an account might be taken of the testatrix's personal estate, and that the same might be applied in a due course of administration, and that the clear residue of it might be ascertained; and that the shares of the adult plaintiffs of and in the said trust premises might be paid or transferred to them, and that *the shares of [*529] the infants and of the defendant E. Clogstoun, might be secured for their benefit; and that guardians might be appointed to them, with suitable allowances for their maintenance.

Mr. Bethell and Mr. G. L. Russell for the plaintiffs:—The will itself plainly shows that the person who prepared it, was ignorant both of the state of the testatrix's family, and of the existence of the power which she had under the settlement. For, first, the will directs that, after the determination of the trust thereinbefore contained for the maintenance of Edward Clogstoun and during the rest of his minority, it should be lawful for the trustees to apply all or any part of the dividends and interest of the then *presumptive* share of any of the testatrix's children whose shares *should not then have become vested*, for their maintenance, until their respective shares *should become vested*. Now Edward was the youngest child, and the ages of the other children were such that when he attained eighteen, at which time the trust for his maintenance was to determine, the shares of all the other children, except one, would be vested, and the share of that one would vest within a month afterwards.(a) Secondly; if the will is to be held to be an execution of the power, the effect will be that all the children except Caroline and Augusta, may be left destitute of any provision until Edward attains eighteen; for, during the intermediate time, the income of the

(a) Edward would attain eighteen on the 6th of February, 1850; and Augusta, the next youngest child, would attain twenty-one on the 21st of March following.

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whole of the property is applicable to his maintenance. [*530] There is another reason for *holding that the bequest in question was meant to operate only upon the testatrix's own property. For it is a bequest of a residue after payment of debts and funeral and testamentary expenses: but the funds which were the subject of the power, could not be applied to the payment either of the testatrix's debts or of her funeral or testamentary expenses. It is laid down by Sir Edward Sugden, that, in cases like the present, it is intention that is to govern: and, therefore, where it can be inferred that the power was not meant to be exercised, the court cannot consider it as executed.^(a) And we submit that it is to be inferred, from the will in this case, that the testatrix intended to dispose of property over which she had the absolute dominion, and not of property over which she had only a qualified and limited power.

Mr. Cooper and Mr. Lewis for the defendant Edward Clogstoun:—It cannot be assumed that, if the will is held to be an execution of the power, the children for whom no provision is made by it, will be left destitute until Edward shall attain eighteen; for they may have fortunes wholly independent of either of their parents. The words which the testatrix has used are, not only: "I give and bequeath," but also: "and by virtue of every power enabling me in that behalf, appoint:" and the property which she proceeds to dispose of, is property which she had power to dispose of, as well as property which she was possessed of or entitled to. Therefore, it is clear that she meant her will to operate upon property of both descriptions: and, as the disposition which she has made is in favor of persons [*531] *who were objects of the power under the settlement, she has not dealt with the funds which were the subject of her power, in a manner inconsistent with the power, and, consequently, the court is not at liberty to say that her will is not an exercise of the power. The testatrix has blended the two species of property together; and if the residuary clause is construed, as it ought to be, that is *reddendo singula singulis*, the

(a) See 1 Sugd. Pow. (6th edit.) 440.

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words: "after payment of all my debts, funeral and testamentary expenses," will be held to refer, exclusively, to the property of which she was owner. Consequently, the argument founded on those words, entirely fails. *Maples v. Brown.*(a)

Mr. *James Parker* appeared for Walcott and Wilder.

THE VICE-CHANCELLOR:—The court must put a reasonable construction upon the language which the testatrix has used: and, although, in making the disposition in question, she has referred, in terms, to every power enabling her in that behalf, which, *prima facie*, would include every power enabling her to make the disposition, the question is whether the terms which she uses when she proceeds to make that disposition, do not show that she did not intend to exercise the particular power in question. The question resolves itself into this: did the power enable her to do that which she has professed to do?

After giving two legacies of 1,000*l.* each, upon certain trusts for the benefit of two of her daughters and their children, she gives and bequeaths, and, by virtue *of every [*532] power enabling her in that behalf, appoints all the property, of what nature soever and wheresoever, of or to which she was then, or, at the time of her death, should or might be possessed or entitled or have power to dispose, to Walcott and Wilder (who, it is to be observed, are the very same persons as were trustees of the settlement) upon trust, after payment of all her debts and funeral and testamentary expenses and the two legacies of 1,000*l.*, to lay out and invest *the residue* thereof, in their names, in the public stocks or funds of Great Britain, or upon government or real securities in England; with full power to them to vary such stocks, funds or securities for other stocks, funds or securities of the same or the like nature. So that she disposes of nothing except what constitutes *residue* after payment of her debts, funeral and testamentary expenses, and the legacies which she had bequeathed in the preceding part of her will.

(a) *Ante*, Vol. II, p. 327.

1843.—Steele v. Stewart.

Now it is quite clear that the funds which were the subject of the power vested in her by the settlement, could not be subjected to the payment either of her debts or of her funeral or testamentary expenses. What she gives, she gives as residue: and that circumstance shows clearly to my mind at least, that the property which she intended to dispose of, was not the property which was the subject of the limited power of disposition which she had under the settlement.

Besides, she has directed the trustees to invest the residue in their names, in the public stocks or funds or on government or real security, and has empowered them to change the securities for others of the like nature, as often as they should think proper. But, if the testatrix intended her will to be an appointment of the funds comprised in the settlement, those powers [*538] were *unnecessary; for the trustees, who, as I before observed, were the very same persons as were the trustees of the funds subject to the power of appointment, had ample powers given to them, for the same purposes, by the settlement: and, at the time when she made her will, those funds were, in fact, invested in stock in their names.

It seems to me, therefore, from the two circumstances to which I have adverted, that the testatrix intended to exercise, not the limited power which she had under the settlement, but the general power of disposition which she had over her own property.

Consequently, I shall declare that her will was not an execution of the power which she had under the settlement.

STEELE v. STEWART.

Production of Documents.—Privileged Communications.

1843: 20th and 22d July.

A. was employed, by the attorney of the plaintiff in an action, to collect evidence for the plaintiff: Held, that, although A. was not an attorney, the communications

1843.—Steele v. Stewart.

made by him to the plaintiff and his attorney, relating to the evidence, were privileged.[1]

THE defendant having recovered a verdict against the plaintiff, in an action on a policy of insurance on a ship, which was so damaged, on a voyage to India, that she was condemned and broken up at Calcutta, the plaintiff obtained a rule for a new trial, and then filed a bill of discovery to enable him to defend the action, alleging that the ship was not seaworthy when the policy was effected.

One of the schedules to the defendant's answer to the bill, contained a list of certain letters which *the captain [*584] of the ship had written from Calcutta: and the answer stated, in the body of it, that the defendant, at the suggestion and by the advice of his solicitors, had sent the captain to Calcutta, after his return to England, for the express purpose of collecting evidence in support of the action; and that the letters mentioned in the schedule, were written, by the captain, to the defendant and his solicitors, whilst he was at Calcutta, *acting by the direction and as the agent of the defendant's solicitors, in procuring evidence in support of the action, and that they related to and concerned such evidence*, and, therefore, were privileged and confidential communications, and the defendant was not bound to produce them.

On the hearing of a motion for the production of the scheduled documents, the principal question was whether the defendant was compellable to produce the letters.

Mr. *Bethell* and Mr. *Hetherington* in support of the motion, said that no communications, except between a solicitor and his client, were privileged; that the captain did not stand in the relation of solicitor to the defendant; and, consequently, the privilege did not extend to his letters.

Mr. *Romilly* and Mr. *Lewis*, for the plaintiff, said that the privilege was not confined to the solicitor in an action or suit, but

[1] Affirmed on appeal to Lord Chancellor. 1 Phil. R. 471.

1843.—Steele v. Stewart.

extended to his clerk, and to any person whom he might have thought proper to employ as his agent in the action or suit; that, if the defendant's solicitors had employed a solicitor at Calcutta, instead of the captain, to collect evidence in support of the action, there could have been no doubt that the solicitor's [*535] communications to them would have been *privileged.

Taylor v. Foster,(a) *Parkins v. Hawkshaw*,(b) *Curling v. Perring*,(c) *Preston v. Carr*,(d) *Llewellyn v. Badeley*,(e) *Langhorn v. Allnutt*,(g) *Kahl v. Jansen*,(h) *Clagett v. Phillips*,(i) and *Hughes v. Biddulph*,(k)

Mr. Bethell in reply referred to *Storey v. Lord George Lennox*,(l) and said that communications made by a clerk were not privileged, unless he was permanently in the employment of the solicitor in the action or suit.

THE VICE-CHANCELLOR:—The authorities that have been cited, establish that, if the party who was sent to collect the evidence, had been a clerk of the defendant's solicitors, his communications would have been privileged. And, in my opinion, there is no difference, in principle, whether the communications are made by the clerk to a solicitor, or by a person whom the solicitor has employed, specially, as his agent, to collect evidence on behalf of the client. I admit that this is an extension of the rule; but it seems to me that the principle on which the Lord Chancellor acted in *Hughes v. Biddulph*, applies to the present case: and, accordingly, I think that the letters which were written, by the captain of the ship, to the defendant and his [*536] solicitors, relative to the evidence *which the captain had collected in support of the action, are privileged, and ought not to be produced.(m)

(a) 2 Carr. & Payne, 195.

(g) 4 Taunt. 511.

(b) 2 Stark, 239.

(h) 4 Taunt. 565.

(c) 2 Myl. & Keen, 380. See judgment.

(i) 2 Youn. & Coll. C. C. 82.

(d) 1 Youn. & Jerv. 175.

(k) 4 Russ. 190.

(e) 1 Hare, 527.

(l) 1 Keen, 341, and 1 Myl. & Cr. 525.

(m) See *Bunbury v. Bunbury*, 2 Beav. 173.

 1843.—Parker v. Constable.

PARKER v. CONSTABLE.

Injunction.—Pleading.

1843: 26th July.

A judgment creditor, who had obtained possession of his debtor's estates under an *elegit*, filed a bill after the debtor's death, against his devisee, claiming to have a charge on the estates, under 1 and 2 Vict. c. 110, and praying to have the debt raised and paid out of the estates. The defendant, in her answer, claimed the estates, not as devisee, but under a conveyance executed by the debtor in his lifetime. The plaintiff, instead of amending his bill, filed a supplemental bill against the defendant, praying that the conveyance might be declared to be fraudulent and void, as against him, and also that an ejectment to recover possession of the estates, which the defendant had brought shortly before she put in her answer to the original bill, might be stayed. The answer to the supplemental bill admitted, in effect, that the conveyance was voluntary. The court, however, held that, as that admission was made in the answer to the supplemental bill, it was not sufficient to sustain the injunction.

In July, 1840, the plaintiffs obtained a judgment against Richard Constable; and, in October following, they sued out an *elegit*, under which possession of his real estates in Kent was delivered to them by the sheriff. In December, 1840, Constable died, having devised all his real estates to his daughter, the defendant, Elizabeth Constable, in fee, and appointed her sole executrix of his will. In January, 1843, the plaintiffs filed a bill against Elizabeth Constable, in order to obtain the benefit of the charge on the testator's real estates, which they had by virtue of their judgment, under the act for abolishing arrest on mesne process and extending the remedies of creditors against the property of debtors.^(a) In February, 1843, Elizabeth Constable brought an ejectment against the plaintiffs' [*537] tenant, to recover possession of the testator's real estates; and, a few days afterwards, she filed her answer, in which she claimed to be entitled to the real estates, not under the will of Richard Constable, but under a conveyance from him dated in February, 1839, by which he had limited the estates to himself for life, with remainder to the defendant in fee. In March, 1843,

(a) 1 & 2 Vict. c. 110, s. 13.

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she filed a cross bill against the plaintiffs, praying that the *elegit* might be declared void as against her, and that the plaintiffs might deliver up to her possession of the estates, and might account to her for the rents received by them.

In April, 1843, the plaintiffs filed a supplemental bill against Elizabeth Constable, praying that the conveyance of February, 1839, might be declared to be fraudulent and void against the plaintiffs as creditors of the testator; that the plaintiffs might have the same relief as they had prayed by their original bill; that the action of ejectment might be stayed, and that the supplemental and original suits might be heard together.

The injunction having been obtained, Elizabeth Constable put in her answer to the supplemental bill, and then obtained an order *nisi* for dissolving the injunction.

Mr. *Stuart* and Mr. *Steere* now showed cause against that order being made absolute. They read a passage from the answer to the supplemental bill, in which Elizabeth Constable stated that the conveyance of February, 1839, was made for the purpose of making a provision for her, and in consideration of the grantor's natural love and affection for her, and of the attention [*538] *that she had paid, and the services that she had rendered to him during his great age and infirmities: and they contended that that passage amounted to an admission that the conveyance was voluntary, and, therefore, void as against the creditors of the grantor, under 13 Eliz. c. 5.

Mr. *Bethell* and Mr. *Dixon*, for the defendant, said, first, that the question whether the conveyance was voluntary or not, was a legal question, and would be tried in the ejectment; and that a judgment creditor had no equity to deprive the defendant of her right to try that question in a court of law; secondly, that the bill on which the injunction had been obtained, could not be termed, with any propriety, a supplemental one; because it was founded on a totally different ground of equity, and was discordant in its nature and character from, and, consequently, could not

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be attached to the original bill : and that, therefore, it was impossible to maintain any order upon the two bills.

THE VICE-CHANCELLOR :—When I had heard out the argument for the plaintiffs, I was not aware what was the precise mode in which the original bill was constructed ; but it seemed to me that, if it did not appear, upon the answer of the defendant upon which cause is shown, that the defendant admitted that there was a question in equity which she was litigating in one way and the plaintiffs in another way, that, of itself, would be a reason why the injunction should be continued ; but then it must be a question *in the same cause* ; and I did understand, at the time, that the original bill was not precisely in the form in which I now find it to be.

The case stands in this way : the original bill is *filed [*539] by the plaintiffs, insisting upon the statutory benefit which they have, by virtue of being judgment creditors, against the defendant as devisee of the land from the debtor on the judgment. To that bill the defendant put in a very long answer, and, after having filed it, she filed what she called a cross bill ; in which she might have stated whatever she pleased ; for there can be no demurrer to a cross bill, because it comes forward in the shape of a defence. Then, by her answer to the original bill and by her cross bill, she set up, as a defence against the claim that was made against her in the character of devisee, that she claimed by an elder and better title, namely, by the conveyance that was made to her in February, 1839. I ought to have mentioned before, that she had commenced an ejectment before she filed her answer. Then what did the plaintiffs do ? Having got the answer, they did not amend their original bill, but filed a bill, (which was a very proper bill of supplement in one respect,) stating the fact of the action having been brought, which was purely supplemental ; and also stating divers matters whereby they considered themselves entitled to pray that the conveyance might be set aside. So that, instead of the original bill being amended for the purpose of stating the conveyance and charging that it was void, and that, therefore, the only character in which

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the defendant could take, was the character of devisee, I have the original bill asking relief against her in the character of devisee, and another bill proceeding upon a foundation of facts which happened before the filing of the original bill, and, therefore, ought to have been introduced, by way of amendment, into the original bill. If that course had been adopted, the first question at the hearing would have been: Is the conveyance good?

And if it were held to be void, then the defendant [*540] would stand only in the character of devisee: and the next question would be, whether the plaintiffs, being judgment creditors and having taken out an *elegit*, were entitled to the statutory benefit which is given to judgment creditors. Such would have been the course of proceeding if the original bill had been amended in the manner which I have pointed out.

The plaintiffs, however, instead of amending their original bill, have thought proper to file another bill, (which they call a supplemental one,) for the purpose, not only of obtaining an injunction to stay the proceedings in the ejectment, but also of bringing before the court those matters relating to the conveyance to the defendant, which they ought to have introduced into their original bill: and the consequence will be that I shall have to hear the case made by the second bill, first; and, if I decide that suit in favor of the plaintiffs, I shall have to hear the case made by the original bill afterwards. So that I must decide the second question before I decide the first.—[Mr. Stuart:—The defendant states, in her answer to the original bill, that she derives her title under the conveyance of February, 1839; and, therefore, the question as to the validity of that conveyance, is involved in the original suit.]—That may be so: and I admit that the two suits are joined together to a certain extent. But the question raised by the original bill, is very different from that which is raised by the supplemental bill. The two are, in effect, different suits; and, therefore, it appears to me that it is nothing to say that the answer to the supplemental suit, represents that there is a question in that which, in effect, is another cause. I admit, as I said before, that, to a certain extent, the two are joined together, [*541] but, in effect, they are different suits. And *if, in a suit

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about something, the defendant represents that there is an equitable question about the same thing in another suit, it does not appear to me that there is equity confessed. The equity confessed, to sustain the bill, must be equity confessed in the very suit in which the answer is filed: and my opinion is that the course which the plaintiff has taken, is not such as to allow him to have the benefit of the fact that there is an equitable question raised, between the plaintiff and the defendant, upon the original bill.

Taking it merely as a supplemental bill or a separate bill, but as a bill to which an answer has been put in, it does not appear to me that there is any equity confessed; and, therefore, the order for dissolving the injunction must be made absolute.(a)

(a) The plaintiffs appealed to the Lord Chancellor from the above order; and, in Michaelmas Term, 1845, his Lordship delivered the following judgment:

The original bill stated that Richard Constable was indebted to the plaintiffs in the sum of 427*l*.; that a judgment was obtained against him for that sum in the Court of Queen's Bench; that he was seised of and in the receipt of the rents and profits of a certain real estate, or that he had a certain disposing power over it which he might exercise for his own benefit, without the assent of any other person; and that the plaintiffs sued out an *elegit* on the judgment, and were put into possession of the property by the sheriff. The bill further stated that the rents were of small amount, and not sufficient to satisfy the debt within any *reason- [*542] able time; that, under the statute, the plaintiffs were to be considered as having a charge on the estate from the date of the judgment. The bill further stated that Constable devised and bequeathed all his real and personal estate to the defendant, and appointed her his executrix; and it prayed that the estate might be sold and the debt paid out of the proceeds. The defendant, in her answer, alleged that, before the judgment was entered up, Constable conveyed the estate to the use of himself for life, with remainder to the defendant in fee, and denied, therefore, that he had any disposing power over the property in question. Before the filing of the answer, the defendant brought an action of ejectment in the Court of Exchequer, against the tenant of the plaintiffs, to recover possession of the premises. The plaintiffs then filed a supplemental bill against the defendant, restating most of the facts contained in the original bill, with much additional matter; and setting out a voluminous correspondence. They alleged the conveyance to have been without consideration, and to be fraudulent and void as against them by virtue of the statute of Elizabeth; and they prayed a declaration to that effect. They also stated the fact of the ejectment having been brought, and prayed for an injunction. The common order having been obtained, the Vice-Chancellor of England disallowed the cause

 1843.—Ibbetson v. Ibbetson.

shown and dissolved the injunction. The object of the present motion is to discharge the Vice-Chancellor's order.

It has been truly stated that the greater part of the new matter contained in the supplemental bill, occurred before the filing of the original bill, and ought, therefore, to have been made the subject of amendment, and not brought forward by [*543] way of supplement; and, that *the only material fact that occurred after the filing of the original bill, was the bringing the ejectment.

The rule is that nothing can be properly made the subject of a supplemental bill which might have been introduced, by amendment, into the original bill. Nothing, therefore, can be more irregular than the state of this record; and, as it is of the utmost consequence to adhere to rules of pleading in this court, which tend so much to facilitate the administration of justice, I do not think that I should be warranted in granting the present application.

The motion is made in the supplemental suit; *and there is no matter, properly supplemental, in that suit that can support it.*

It would, I think, be extraordinary to bring in aid, for that purpose, matter which is not supplemental, and which ought never to have been introduced into the bill.

It was suggested, indeed, that the bill might be treated as an original bill, disregarding the former bill. But it professes to be a supplemental bill, and it is such in its frame. The original bill is undismissed. The defendant has put in her answer to that bill and is entitled to the benefit of her answer. It is clear, therefore, that the former bill cannot be treated as a nullity, or the second bill considered otherwise than as a supplemental bill; though it is an irregular supplemental bill. I agree, therefore, with the Vice-Chancellor, and think that he was right in refusing to sustain the injunction.

 [*544]

*IBBETSON v. IBBETSON.

Administration.—Assets.—Debts.—Specific Legacies.

1843: 21st July and 18th Novemoer.

A., the executor of B., dealt with canal shares, which had belonged to B., as his own property, and ultimately bequeathed them to C.; and he gave certain other chattels, which always had been his own property, to D., and died possessed of but very little other property, leaving some of B.'s debts unpaid, and a balance due from him in respect of his receipts and payments on account of B.'s estate. At his death, the canal shares remained standing in B.'s name: Held, that those shares were not exclusively applicable to pay B.'s unsatisfied debts; but that A.'s general personal estate must be applied first, and that C. and D. must contribute

1843.—Ibbetson v. Ibbetson.

to make up the deficiency, in proportion to the value of the articles bequeathed to them respectively.

THE original hearing of this cause, is reported *ante* Vol. X, p. 495, and the hearing for further directions, *ante* Vol. XII, p. 206. The appeal from the decree is reported in 5 Myl. & Craig, p. 26. The cause now came on to be heard, a second time, for further directions.

Sir Charles Ibbetson, the brother and executor of Sir Henry Carr Ibbetson, died, in 1839, possessed of plate, furniture, &c., some of which was his own property, and the rest the property of his deceased brother. He was possessed also of shares in the Calder and Hebble Navigation Company, in his own right; and had treated as his own some other shares in that company, which had been the property and still remained in the name of his brother. He left some of his brother's debts unpaid; and it appeared, by a report made in the cause, that a balance of 3,937*l.* was due from him in respect of his receipts and payments on account of his brother's estate.

By his will, he directed his debts to be paid, in the first place, out of his personal estate not specifically bequeathed; and, if that should be insufficient, then *out of the funds [*545] thereafter given to his younger son, James Frederick, and his daughter, Laura. He then bequeathed all his shares in the Calder and Hebble Navigation Company, (meaning thereby, as the counsel for the different parties admitted, his late brother's as well as his own shares,) and also his stock in the French funds, to his son, Frederick James, his stock in the English funds, to his daughter, Laura, and certain sums secured on part of his family estates, to his same son and daughter. He next made dispositions of his plate, furniture, &c., (which, it was likewise admitted, comprised his own as well as his brother's property,) in favor of his elder son, Henry Charles, and his younger son, Frederick James; and, lastly, he gave certain jewels, trinkets, &c., to his daughter, Laura, and appointed John Thomas Selwyn and Dame Alicia Mary Ibbetson, his brother's widow, the executor and executrix of his will.

1843.—Ibbetson v. Ibbetson.

The testator having left but little, if any, personal property, except that which he had specifically disposed of, and the funds bequeathed to Frederick James and Laura being insufficient to discharge his debts, the question was, in what manner the payment of Sir Henry Carr Ibbetson's unsatisfied debts was to be provided for.

Mr. *Walker* and Mr. *Elmsley*, for the plaintiff Frederick James Ibbetson, and Mr. *Bethell* and Mr. *Parry*, for the defendant Sir Charles Henry Ibbetson, contended that the balance of 3,957*l.* was to be first applied in payment of Sir H. C. Ibbetson's debts, and if it should prove insufficient, then that the chattels specifically bequeathed, by Sir Charles, to his sons and daughter, must contribute in proportion to their values, to make up the deficiency.

[*546] *Mr. *James Parker* and Mr. *Walford*, for the defendant Laura Ibbetson, contended that the assets of Sir Henry Carr Ibbetson remaining *in specie*, must exclusively maintain, as far as they would extend, the burden of paying his debts. *Halliway v. Tanner*, (a) *Scott v. Beecher*, (b) and *Lord Ilchester v. Lord Carnarvon*, (c) which they principally relied on.

THE VICE-CHANCELLOR:—The question in this case, really arises on the will of Sir Charles Ibbetson.

Sir Henry Carr Ibbetson died possessed of canal shares, furniture, plate and other articles, which Sir Charles, his brother and executor, possessed himself of and dealt with as his own; and, indeed, he so dealt with the general assets of Sir Henry, that, at his death, his estate was indebted to the estate of Sir Henry. Then, it is not disputed that, by the bequests in Sir Charles' will of *his* canal shares, plate, furniture, &c., the shares, plate, furniture, &c., both of Sir Henry and Sir Charles, passed; and, therefore, the legatees of those articles take them just as if they had been, in fact, wholly the property of Sir Charles. The

(a) 1 Russ. & Myl. 633.

(c) 1 Beav. 209.

(b) 5 Madd. 28.

1843.—The Attorney-General v. The Corporation of Lichfield.

debts due from his estate to the estate of Sir Henry, must be paid in precisely the same manner as any other debts of Sir Charles: that is, his general personal estate must be applied, first, in payment of them; and, as he has directed his debts to be paid out of the funds given to his son Frederick James and his daughter, Laura, (by which I understand him to mean the sums given to them jointly,) if his personal estate not specifically *bequeathed, should be insufficient to pay [*547] them, those funds must be next applied; and, if they also prove insufficient, all the other specific legacies must contribute, proportionably, to make up the deficiency.

• Declare that all the debts of Sir Charles Ibbetson, including the debts due from him to the estate of Sir Henry Carr Ibbetson's estate, must, so far as the general personal estate of Sir Charles and the specific funds given to Frederick James Ibbetson and Laura Ibbetson jointly, are insufficient, be satisfied by the specific legatees of the canal shares, plate, furniture, &c., out of their specific legacies, proportionably.

THE ATTORNEY-GENERAL v. THE CORPORATION OF LICH-
FIELD.(a)

Municipal Corporation.—Debt.

1843: 25th July.

The corporation of Lichfield, constituted under the municipal corporation act, 5 and 6 Will. IV, c. 76, borrowed 200*l.* of M., to enable them to pay L., their then treasurer, sums which he had paid to creditors of the old corporation, and gave M. their promissory note for the 200*l.* They did not, however, pay over that sum to L., but suffered him to receive their then accruing income in reduction of what was due to him, and applied the 200*l.* to purposes to which the income would otherwise have been applicable: Held, that the corporation had no authority to give the promissory note, as it was not given to secure a debt due prior to the passing of the 5th and 6th Will. IV, c. 76.

MOTION to dissolve an injunction restraining the defendants from ordering the treasurer of the corporation to pay, out of the

(a) 16 Sim. 227.

1843.—The Attorney-General v. The Corporation of Lichfield.

city or borough fund, or any funds or property of the corporation, any sum or sums of money in or towards satisfaction of the claims of one Mallett, in respect of the promissory note for 200*l.* mentioned in the information.

[*548] *The answer stated that in 1837, the defendants being indebted, in 500*l.*, to William Lawton, their then treasurer, for sums which he had paid out of his own moneys, in liquidation of debts *incurred by the old corporation, prior to the passing of the municipal corporation act, 5 & 6 Will. IV, c. 76,* and Lawton being entitled as against the defendants, to stand in the place of the creditors whom he had paid, the defendants borrowed 200*l.* of Mallett, to enable him to pay the 500*l.* due to Lawton, and gave Mallett their promissory note for that sum, which was signed by the then mayor, and sealed with the corporate seal; that the 200*l.* was not paid over to Lawton, but he was permitted to receive, in reduction of the 500*l.*, the then accruing income of the corporation, which, otherwise, would have been applied in payment of the ordinary expenses of the corporation, and the 200*l.* was applied by the then mayor in payment of those expenses; and that, in manner aforesaid and by means of the 200*l.*, the defendants were enabled to satisfy and did satisfy and discharge to the extent of 200*l.*, the amount of debt which had been originally created or incurred by the old corporation, prior to the passing of the municipal corporation act.

Mr. *Stuart* and Mr. *Cole* appeared in support of the motion.

Mr. *Bethell* and Mr. *Greene* opposed it.

In the course of the argument the 5 & 6 Will. IV, c. 76, sect. 92; 6 & 7 Will. IV, c. 104, sect. 1 · and 7 Will. IV and 1 Vict. c. 78, sect. 28, were referred to.

THE VICE-CHANCELLOR:—My opinion is that the injunction ought neither to be dissolved nor even altered; for it is [*549] quite clear, taking all *the acts of Parliament that

1843.—*Roberts v. Madocks.*

have been referred to, together, that the corporation had no authority to give the promissory note to Mallett; for it was not given either to secure an old debt, or to a person to whom money was due before the passing of the first municipal corporation act passed in the reign of his late Majesty.

ROBERTS *v.* MADOCKS.*Annuity.—Injunction.*

1843: 2d and 3d November.

The grantor of an annuity had admitted, in his answer to a bill in Chancery, that the annuity was a subsisting charge on his estates, and the decree and proceedings in the suit had treated the annuity as valid.

Under those circumstances, the grantor's devisee was restrained from proceeding at law, to set aside the annuity for want of a memorial.

IN December, 1807, Griffith Parry, being seised of an estate in Carnarvonshire, subject to a mortgage for a term of years to Thomas Parry Jones Parry, conveyed the equity of redemption to William Alexander Madocks, in consideration of an annuity for the life of G. Parry, which was charged upon the estate. On the 22d of June, 1810, Madocks, in consideration of 5,000*l.*, granted an annuity of 500*l.*, which also was charged upon the estate, to Henry Wright, for three lives; and the bill alleged that the estate *was of greater annual value than that annuity*. In August, 1816, Thomas Parry Jones Parry filed a bill of foreclosure against Griffith Parry, Madocks, Wright, and H. C. Berkeley who was the trustee of a term of years for securing Wright's annuity.^(a) In May, 1817, Madocks put in his answer to that bill, in which he admitted that he had granted the annuity of 500*l.* to Wright, *and that it was then a subsisting charge upon the estate*. On the 5th of May, 1823, the cause was heard, and it was then referred to the master to take an account of what was due to Thomas Parry Jones Parry, for principal and inter-

(a) This, probably, was the suit of *Parry v. Wright*, which is reported in 1 Sim. & Stu. 369.

1843.—*Roberts v. Madocks.*

[*550] est *on his mortgage, and to tax his and also Berkeley's costs, which were to be paid by T. P. Jones Parry; and it was ordered that, upon Griffith Parry paying to T. P. J. Parry, such principal, interest and costs, within six months after the master should have made his report, T. P. J. Parry should re-assign the mortgaged premises and deliver up documents as therein mentioned; (a) but, in default of such payment, that G. Parry should be foreclosed; and, in case of such foreclosure, it was ordered that the master should compute T. P. J. Parry's subsequent interest and tax his subsequent costs, and appoint a new time and place for payment of what should be found due to him, and, upon Wright paying to T. P. J. Parry what should be so found due to him, within three months after the master should have made his subsequent report, it was ordered that T. P. J. Parry should re-convey the mortgaged premises and deliver up documents as therein mentioned; (a) but, in default of such payment, Wright was to be foreclosed; and, in case of such foreclosure, it was ordered that the master should compute T. P. J. Parry's further subsequent interest and tax his subsequent costs, and appoint a new time and place for payment of what should be found due, and, upon Madocks paying, to T. P. J. Parry, what should be reported due to him, within three months after the master should have made his report, it was ordered that T. P. J. Parry should reconvey the mortgaged premises and deliver up documents as therein mentioned; (a) and, in default of Madocks paying to T. P. J. Parry what should be found due to him, Madocks was to be foreclosed: but, in case Griffith Parry should redeem T. P. J. Parry, it was ordered that the

[*551] master should *take an account of what was due to G. Parry, for arrears of his annuity, and compute interest on what he should have so paid to T. P. J. Parry, and to tax his costs of the suit; and, upon Wright paying to G. Parry what should be reported due to him for arrears of his annuity, together with what he should have so paid to T. P. J. Parry, with interest thereon as aforesaid, and for his, G. Parry's, costs of the suit, within three months after the master should have made his re-

(a) So in brief.

1843.—*Roberts v. Madocks*.

port, at such time and place as the master should appoint, it was ordered that G. Parry should convey the mortgaged premises (but subject to his annuity) and deliver up documents as therein mentioned; but, in default of Wright paying to G. Parry what should be reported due to him as aforesaid for arrears of his annuity, and what he should have so paid to T. P. J. Parry for his costs of the suit as aforesaid, by the time aforesaid, Wright was, from thenceforth, to stand foreclosed; and, in case of such foreclosure, it was ordered that the master should carry on the account of the arrears of the annuity due to G. Parry, and tax his subsequent costs, and compute subsequent interest on what he should have so paid to T. P. J. Parry; and, upon Madocks paying to G. Parry, what he should have so paid to T. P. J. Parry, with interest thereon as aforesaid, and what should be reported due to him for arrears of his annuity, and for his costs of the suit, it was ordered that G. Parry should reconvey the mortgaged premises (subject to his annuity) and deliver up documents as therein mentioned; but, in default of Madocks paying to G. Parry what he should have so paid to T. P. J. Parry, with interest thereon as aforesaid, together with what should be reported due to him for arrears of his annuity, and his costs of the suit as aforesaid, by the time aforesaid, Madocks was to be foreclosed: but, in case Wright should redeem G. Parry, [*552] it was referred to the master to compute interest on what he should have so paid to G. Parry, and to take an account of what was due to Wright for arrears of his annuity, and to tax his costs of the suit, and to appoint a new time and place for payment of what should be so found due; and, upon Madocks paying to Wright what he should have so paid to G. Parry, with interest thereon as aforesaid, and what should be reported due to Wright for arrears of his annuity, and his costs of the suit, within three months after the master should have made his report, it was ordered that Wright should convey the mortgaged premises (subject to his annuity) and deliver up documents as therein mentioned; but, in default of Madocks paying to Wright what he should have so paid to G. Parry, with interest thereon, and what should be reported due to him for arrears of his annuity and his

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costs of the suit, by the time aforesaid, Madocks was to be foreclosed.^(a)

On the 10th of May, 1826, the master reported what was due, for principal, interest and costs, to T. P. J. Parry, and fixed a time and place for payment of the sum by G. Parry.

Wright appealed from the above decree; but, on the 5th of May, 1828, it was affirmed.

Madocks died in April, 1828, having devised all his real estates to his wife for life, with remainder to his daughter in tail [*553] general, with a devise over to one Holford, *which did not take effect. G. Parry died in 1829, having appointed his wife, Ann Parry, his executrix. She died in March, 1832, having appointed John Pugh her executor. T. P. J. Parry died in January, 1838, having appointed his sons, Thomas Parry Jones Parry and John Parry Jones Parry; his executors; and in September, 1835, they filed a bill of revivor and supplement against Pugh, Mrs. and Miss Madocks, Wright, Berkeley and Holford.

In 1837, Roberts, one of the plaintiffs in the present suit, was appointed receiver of the mortgaged estate. In February, 1839, Pugh died, having appointed L. Williams and E. Rees his executors; and they were brought before the court by a bill of revivor.

In April, 1840, Wright sold and assigned his annuity, and the collateral securities for it, to the plaintiff Roberts; and, in May following, Roberts was brought before the court by a supplemental bill.

In January, 1841, a supplemental decree was made, declaring T. P. J. Parry and his brother to be entitled, as the personal representatives of their late father, to the benefit of the decree of

(a) The above is a copy of the decree as it was set out in the brief. Other forms of decrees of successive foreclosures and redemptions will be found in *Seton on Decrees*, 155 *et seq.*, and in 2 *Newland's Practice*, 339 *et seq.*

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the 5th of May, 1823, and of the report of May, 1826, made in pursuance of it; and referring it to the master to take an account of what was due to them, as such personal representatives, on their late father's mortgage, from the foot of the former report, and to tax them their subsequent costs of the original and supplemental suits, and also the subsequent costs of Berkeley. The decree then directed T. P. J. Parry and his brother to pay to Berkeley his subsequent costs, and the master was to add such subsequent *interest and costs to the principal, in- [*554] terest and costs found due by the report of May, 1826; and on Williams and Rees paying to T. P. J. Parry and his brother, what should be found due to them for such principal, interest and costs, and subsequent principal, interest and costs, and for what they should pay to Berkeley for his subsequent costs, within three months after the master should have made his report, at such time and place as the master should appoint, T. P. J. Parry and his brother were to reconvey and reassign the mortgaged premises, and deliver up documents as therein mentioned; but, in default of such payment, Williams and Rees were to be foreclosed; and, in case of such foreclosure, it was referred back to the master, to compute subsequent interest on the mortgage debt, and to tax the subsequent costs of T. P. J. Parry and his brother, and to appoint a new time and place for payment of what should be found due for such subsequent interest and subsequent costs, together with what should have been before reported due to them, for such further interest and costs as aforesaid; and upon Wright, and Roberts as his assignee, paying to T. P. J. Parry and his brother, what should be found due to them, for such principal, interest and costs as aforesaid, within three months after the report, they were to reconvey and deliver up documents as therein mentioned; but, in default thereof Wright and Roberts were to be foreclosed: and, in case of such foreclosure, it was ordered, &c., &c. The supplemental decree then proceeded to foreclose Mrs. and Miss Madocks and Holford, on like terms: and next, in case Williams and Rees should redeem T. P. J. Parry and his brother, it provided for the foreclosure, first of Wright and Roberts, and, afterwards, of Mrs. and Miss Madocks and Holford: *and, lastly, in [*555]

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case Wright and Roberts should redeem Williams and Rees, it provided for the foreclosure of Mrs. and Miss Madocks and Holford.(a)

On the 11th of April, 1842, Roberts, in obedience to an order in the causes, paid T. P. J. Parry and his brother, out of the rents of the mortgaged estate received by him, the sum which the master had found due to them as directed by the decree of January, 1841; and, thereupon, they assigned their late father's mortgage to a trustee, in trust for Roberts and Williams and Rees. On the 1st of August, 1842, Roberts paid to Williams and Rees the sum which the master had found due to them in pursuance of the decree. On the 24th of December, 1842, the master reported what was due to Roberts, and appointed Mrs. and Miss Madocks and Holford to pay the amount to him on the 24th of March, 1843. But they never made the payment; and, on the 1st of April, 1843, the decree of foreclosure was made absolute against them.

The bill in the present suit, was filed, on the 17th of June, 1843, by Roberts and Wright, on behalf of Roberts and the other creditors of Madocks, against Mrs. and Miss Madocks and M. H. Edwards, (to whom administration to Madocks' estate had been granted in December, 1842,) and, after stating the matters before mentioned, it alleged that the whole of the debt found due by the master to Roberts, together with a further arrear of his annuity since accrued, still remained due to him; that the judgment which had been entered up against Madocks, and by which that annuity was collaterally secured, had been [*556] revived and was in full force against *his estate and effects; that the estate, the equity of redemption of which had been foreclosed, was not equal, in value, to one-fourth of the debt found due to Roberts; that Madocks, in addition to that estate, died seised of very large estates both in England and Wales, and that the income arising therefrom, and from certain tolls and harbor dues which formed part of his estate, was to a very large amount, and that the same had been received by Mrs.

(a) See the decree of May, 1823.

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Madocks, since her husband's decease, and applied by her to her own use. The bill prayed for an account of what was due to Roberts, in respect of the sum found due to him by the master, and the further arrear of his annuity and the judgment for securing the same; and for an account also of Madocks' real and personal estates; that his real estates might be sold, and that the debts due to Roberts and the other creditors of Madocks might be paid; and for a receiver of his personal estate and of the rents and profits of his real estates and of the tolls and harbor dues, and for an injunction to restrain the defendants from receiving the same, and from selling the real estates except under the direction of the court.

On the 8th of June, 1843, Mrs. and Miss Madocks obtained a rule of the Court of Queen's Bench, intituled, "*Wright v. Madocks*," requiring Wright to show cause why the annuity deed of the 22d of June, 1810, the warrant of attorney given as a collateral security, and the judgment entered up thereupon, should not be set aside, on the ground that those securities had not been enrolled pursuant to 17th Geo. III, c. 26, and that the lands on which the annuity was secured, were not of equal or greater annual value than the annuity.

Mr. *Bethell* and Mr. *Renshaw* for the plaintiffs, now *moved for an injunction to restrain Mrs. and Miss Ma- [*557] docks from taking any proceedings for the purpose of having the rule made absolute. They relied on the admission, in Madocks' answer to the foreclosure bill, that the annuity was a subsisting charge upon the mortgaged estate, and they said that the decree in the foreclosure suit was a final adjudication respecting the validity of the annuity; and that not only Madocks, but all persons claiming under him were bound by that admission and adjudication. They then referred to the supplemental decree and to the proceedings that had taken place under it, in which the grant of the annuity to Wright and the transfer of it to Roberts, were treated, throughout, as valid transactions: and they relied, more especially, upon the report of the 24th of December, 1842, in which the master certified, in effect, that he

had been attended by the solicitors of Mrs. and Miss Madocks, and, *in their presence*, had proceeded to the matters referred to him, and from which it appeared that Roberts had made a payment amounting, nearly, to 5,000*l.*, to Williams and Rees, in pursuance of the decree; and in which also the master found what was due to Roberts, for the arrears of his annuity and for the payment which he had so made. They concluded by asking whether the defendants ought to be allowed to annul, as they were attempting to do, the decrees and proceedings of the Court of Chancery, by which the validity of the annuity had been so fully established, by obtaining a rule from the Court of Queen's Bench, grounded on a stale objection founded on the act of George III.

Sir C. Wetherell, Mr. Swanston and Mr. Craig for the defendants:—The admission made by Madocks, amounts to [*558] nothing; *for the annuity was a subsisting charge, until it was set aside: and, moreover, that admission was made, *inter alios*; for it was made, not by Madocks, the grantor, to Wright, the grantee, but to Parry, the plaintiff in the suit. Besides, it does not appear that Madocks, when he put in his answer, knew that no memorial of the annuity had been enrolled; and an admission is not binding, unless it appears that the party knew his rights at the time when he made it.

[THE VICE-CHANCELLOR:—A course of proceeding has taken place, on the faith of Madocks' admission, in the progress of which Roberts has paid nearly 5,000*l.* out of his own pocket, in addition to the sums which he paid, in obedience to the orders of 1842, out of the rents of the mortgaged estate.]

By the act of George III, the grant of the annuity and all the securities for it, are void to all intents and purposes. Can this court give validity to those instruments in direct contravention of the act? *Bromley v. Holland*,^(a) *Davis v. Lord Strathmore*,^(b) *Doe v. Ford*.^(c)

(a) Coop. C. C. 9, and 5 Ves. 610, and 7 Ves. 3.

(b) 16 Ves. See p. 428.

(c) 3 Adol. & Ell. 649.

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Mr. *Bethell* in reply, said that the validity of the annuity had been admitted by Madocks and established by the decree in the original foreclosure suit, and that it had been recognized by the decree and proceedings in the supplemental suit to which Mrs. and Miss Madocks were parties; and that, under those circumstances, the court would not permit them to dispute the validity of the annuity, in a collateral proceeding in another court.

*THE VICE-CHANCELLOR:—The question is whether [*559] the proceeding, in the Court of Queen's Bench, to set aside the annuity, can have any use; the object of the parties who have instituted that proceeding, being, in effect, to set aside what has taken place in this court.

It seems to me that, even if the Court of Queen's Bench should decide that the annuity is void for the reason assigned, the proceedings in this court must remain just as they are.

The decree of the 5th of May, 1823, placed the co-defendants in the situation of plaintiff and defendant with respect to each other; for it gave each of them the same rights as they would have had if they had instituted separate suits against their co-defendants.

After the admission deliberately made by Mr. Madocks, under whom the parties who have obtained the rule at law, claim, and after the proceedings that have taken place in this court, have been allowed to go on for so great a number of years, I cannot conceive that any court would take upon itself to say that the annuity was not good, when the objection made to it was on no other ground than the value of the estate upon which it was charged, which it would be very difficult, if not impracticable to ascertain, when so many years have elapsed since the annuity was granted. Of course, if an issue were directed to ascertain the value, the matter would then depend upon the finding of the jury, and the Court of Queen's Bench, perhaps, might adopt what the jury found. But that could have no effect upon the proceedings which have taken place *in [*560] this court. And, if the proceeding in the Court of

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Queen's Bench, can have no good effect, and indeed can have only the mischievous effect of tending to cast a slur upon the proceedings which have been allowed to go on unquestioned, for so great a length of time, in this court, my opinion is that I ought not to permit that proceeding to be carried any further.

I am inclined to think that, if the parties who have obtained the rule, had applied to this court for leave to file a bill of review, the facts that appear in this cause, would have afforded one of the strongest reasons for refusing the application. And, if this court would not have given leave to file a bill of review, I see no reason why it should suffer another proceeding to go on, which can have only a tendency to produce an effect which this court ought not to allow: therefore, I shall grant the injunction.

[*561]

*JONES v. JONES.

Will.—Construction.—Portions.—“Payable” construed “vested.”

1843: 3d November.

Testator bequeathed 10,000*l.* in trust for his son, J. L. J., for life, remainder in trust for the children of J. L. J., when and as they should attain twenty-one, as tenants in common; and, if any of them should die before their shares *became payable*, leaving issue, their shares to be paid to their issue; but if any of them should die before their shares *became payable*, leaving no issue, their shares to be paid to the survivors at the same time as their original shares should *become payable*; and if J. L. J. should have no child, or, having such, they should all die *under age and without issue*, then the trust fund to sink into the residue, which the testator gave to two of his other children. J. L. J. had four children, all of whom attained twenty-one. One of them died, *in his lifetime*, without issue.

Held, that “payable” meant “attain twenty-one,” and, consequently, that one-fourth of the fund vested in the deceased child.

JOHN JONES, by his will dated the 9th of April, 1803, bequeathed the sum of 10,000*l.* to trustees, in trust to invest it in the usual securities; and to pay the dividends, interest, &c., “to my son, John Lloyd Jones, during his life, and from and after his

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decease, then upon trust to pay the interest, dividends and annual produce of one half part of the said stocks, funds or securities, in case the present or any future wife of the said John Lloyd Jones shall happen to survive him, unto such wife during her life; and upon further trust to pay and apply the other half part of the said stocks, funds or securities, and the accruing dividends, interest and produce thereof, and also the said half part of such stocks, funds or securities, the dividends, interest and annual produce whereof is directed to be paid to the wife of the said John Lloyd Jones during her life as aforesaid, from and after her decease, unto and amongst all and every the child and children of the said John Lloyd Jones lawfully to be begotten, share and share alike as tenants in common, *when and as they shall severally attain the age of twenty-one years*; and in case any of the said children shall happen to die before his, her or their shares shall become payable, leaving lawful issue, then

*the share or shares of him, her or them so dying, whe- [*562]
ther original or accruing by survivorship, shall go and be paid unto and amongst such, his, her or their respective issue, equally, share and share alike: but in case any of the said children shall happen to die before his, her or their share or shares shall become payable, leaving no lawful issue, then the share or shares of him, her or them so dying, shall, from time to time, go and be paid to and amongst the survivors and survivor of them, at such time or times as his, her or their original share or shares shall respectively become payable as aforesaid: but, in case the said John Lloyd Jones shall have no child or children, or having such, they shall all die under age and without issue, then I direct the said stocks, funds or securities to sink into and be deemed and considered as part of the residue of my personal estate, and be disposed of as after mentioned. Provided that, in case the said John Lloyd Jones shall happen to die leaving a child or children, or the issue of any deceased child or children, under the age of twenty-one years, it shall be lawful for, and I do hereby direct the said trustees to apply the dividends, interest and produce of the aforesaid stocks, funds or securities to which such child or children, or the issue of such deceased child or children respectively, would become entitled on their severally attaining

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the age of twenty-one years, for and towards his, her or their maintenance and education during his, her or their minority, and likewise, to apply all or any part of his, her or their respective expectant share or shares of the said stocks, funds or securities, in placing out him, her or them clerk or apprentice, or in any other manner for the benefit of such child or children, or the issue of such deceased child or children respectively. I give and

bequeath all the rest and residue of my personal estate [*563] and effects, unto my son, William *Fowler Jones, and daughter, Lucy Eliza Mackay, and to their respective executors or administrators, equally to be divided between them share and share alike, as tenants in common.

The testator died in 1806. John Lloyd Jones had two sons and two daughters who attained twenty-one; and all of them, except the eldest son, survived their father and were parties to the suit. The eldest son died in September, 1831, intestate and without leaving issue. The defendant Jennings was his administrator. John Lloyd Jones died in February, 1838. His wife was still living.

The bill was filed by the trustees of the will, stating that the surviving children of John Lloyd Jones insisted that, according to the true construction of the will, they, by reason of their eldest brother *having died during his father's lifetime*, were entitled to *the whole* of the trust fund, subject, as to a moiety, to the life interest of their mother therein: and that Jennings, as the administrator of the deceased son of John Lloyd Jones, insisted that he was entitled, subject as aforesaid, to one-fourth of the fund, inasmuch as the eldest son, *having attained twenty-one, acquired a vested interest* in that portion of the fund. The bill prayed that the rights and interests of all parties, in and to the fund, might be declared.

The cause now came on to be heard as a short cause.

Mr. Teed and Mr. Schomberg appeared for the plaintiffs, the trustees of the will.

1843.—Jones v. Jones.

Mr. *Bethell* for the surviving children of John Lloyd Jones:—
 This case is distinguishable from those in which the
 *word, "payable," has been held to mean "vested," [*564]
 such as *Emperor v. Rolfe*; (a) *Hope v. Lord Clifden*; (b)
Powis v. Burdett; (c) *Howgrave v. Cartier*; (d) *Perfect v. Lord Curzon*. (e) For, first, the question in each of those cases arose, not
 on a will but on a settlement, by which a parent had made a
 provision for his children. Secondly, there was no provision, as
 there is in the instrument now before the court, for the issue of
 the children. Thirdly, the language of the settlement was ob-
 scure and inconsistent, and, therefore, the court felt itself author-
 ized to decide according to the presumed intention of the settler.
 In this case, the language of the will is perfectly plain and un-
 ambiguous; and there is no reason whatever why the word
 "payable," should have any other than its true meaning given
 to it. The shares of the children are to be paid to them on the
 happening of *two* events, namely, the death of their father and
 their attaining twenty-one; and the gift over is to take effect,
 not, simply, on a child dying before his share becomes payable,
 but before his share becomes payable, leaving no lawful issue.
 The case of *Emperor v. Rolfe* was decided upon the two follow-
 ing grounds: first, there was no provision for the children of a
 child dying before the child's portion became payable; and,
 secondly, the time of payment was postponed for the benefit of
 the estate. On referring to the judgment in *Hope v. Lord Clifden*,
 it will be apparent that the motives that induced the court to
 come to the decision in that case do not exist here. *Powis v.*
Burdett, too, was a case between parent and child, and there was
 no provision for the issue of a child. *Howgrave v.*
Cartier *was a case of the same description, and the [*565]
 settlement was ambiguously expressed. Sir W. Grant,
 M. R., in giving judgment in that case, says: "If the settlement
 is incorrectly or ambiguously expressed, if it contains conflicting
 and contradictory clauses, so as to leave, in a degree, uncertain
 the period at which, or the contingency upon which the shares

(a) 1 Vez. 208.

(d) 3 Ves. & Beam. 79.

(b) 6 Ves. 499.

(e) 5 Madd. 442.

(c) 9 Ves. 428.

1843.—*Jones v. Jones.*

are to vest, the court leans, strongly, towards the construction which gives a vested interest to the child when that child stands in need of a provision; usually, as to sons, at the age of twenty-one, and, as to daughters, at that age or marriage." The case of *Perfect v. Lord Curzon* was decided, principally, on the authority of *Howgrave v. Cartier*. Sir John Leach, V. C., in his judgment, says: "This settlement is to be tried by the rule which is stated by Sir W. Grant, in the case of *Howgrave v. Cartier*. If this settlement clearly and unequivocally, throughout all its provisions, makes the right of a child to depend upon its surviving both its parents, then a court of equity has no authority to control that disposition; but if this settlement be, in any of its provisions, ambiguously expressed, so as to leave it, in any degree, uncertain, whether it was intended that the right of a child should depend upon the event of its surviving both its parents, then the court is bound, by authority, to declare, upon what may be called the presumed intention in instruments of this nature, that the interest of a child, though not to take effect in possession until after the death of both parents, did, upon the limitations in this settlement, vest in sons at twenty-one, and in daughters, at twenty-one or marriage. In settlements of this description, there are two sets of clauses to be considered:

the clauses of gift to the children, and the clauses of gift
[*566] over to others upon failure of the children; and the *authorities require that both sets of clauses should be clearly and unambiguously expressed."

The case of *Bright v. Rowe*(a) is the first that arose on a testamentary instrument. There the Master of the Rolls says: "The rule being that, when a testator has unequivocally expressed an intention that a provision to be made for his children, shall depend upon their surviving both their parents, the court must give effect to that intention, and can only lean to the presumption in favor of children, where the intention of the testator is ambiguously expressed. The single question for consideration in this case, is whether, upon the whole will, the testatrix

(a) 3 Myl. & Keen, 316.

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has or has not clearly and unambiguously expressed her intention in that respect. The expressions of the testatrix are not to be subjected to any violence for the purpose of raising an implication in favor of the children; but the ambiguity must appear obviously, upon the face of the will. Mrs. Rowe, having, by her marriage settlement, a power of appointing the principal sum of 2,000*l.* at the decease of her husband, if he should survive her, by a testamentary instrument directed that sum to be equally divided between the only child she then had, and any other child or children she might thereafter have by her husband. She considered that she might die, leaving these children under the age of twenty-one, or, being daughters, unmarried; and she therefore directed that, if the 2,000*l.* should become payable when the child then living, or any other child or children should be under twenty-one or unmarried, the trustees should apply the proportions of such children for their maintenance and education until they *should attain twenty-one or marry, [*567] when their shares were to be paid to them. So far there is a clear direction that the shares shall vest in the children at twenty-one or marriage. But she also foresaw that another event might happen, namely, that the children, or some of them, might not be living at the time of the death of the husband; and she provides for that event by directing that, if her daughter who was then living, or any child or children she might thereafter have, should die before their portions of the 2,000*l.* became payable, then the same should go and belong to the survivors or survivor of them. I can see no ambiguity whatever here; but I am clearly of opinion that, by dying before their portions became payable, the testatrix meant, dying in the lifetime of the husband; and that the shares of the children so dying, are given to the survivors or survivor of them." So the testator in the present case, foresaw that the children of John Lloyd Jones, or some of them, might die in his lifetime, and he has provided for that event by directing that, if they should leave issue, their shares should go to their issue, but, if they should not leave issue, that their shares should go to the surviving children or child.

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Mr. *Romilly*, who was with Mr. *Bethell*, cited *Bielefield v. Record*,^(a) and *Hervey v. M'Laughlin*.^(b) Sir *Charles Wetherell* and Mr. *Prescott White* appeared for the defendant Jennings, the personal representative of the eldest son of John Lloyd Jones. But,

The VICE-CHANCELLOR without hearing them, said:—Suppose that John Lloyd Jones had had two children only, [*568] and one of them had attained twenty-one *and died, without issue, in his lifetime, and the other had died under twenty-one and without issue; where would the trust fund have then gone to?

The only question in this case, is whether the word “payable,” is not equivalent to attaining twenty-one?

The first gift is to the children of John Lloyd Jones, when and as they shall attain the age of twenty-one years; and if any of them happen to die before their shares become payable, leaving issue, their shares are to go to their issue; but, if they die before their shares become payable, leaving no lawful issue, their shares are to go to the survivors or survivor of them; and if John Lloyd Jones shall have no child or children, or, having such, all of them shall die *under age* and without issue, then the fund is to sink into the residue. So that the question is whether “payable” does not mean attaining twenty-one? I think that it does; and, therefore, I shall declare that the defendant Jennings is entitled to one-fourth of the fund, as the administrator of John Lloyd Jones.

(a) *Ante*, Vol. II, page 354.

(b) 1 Price, 264.

1843.—*Ex parte Hawkins*

*IN RE THE LONDON BRIDGE APPROACHES ACT (2D & [569]
3D VICT., c. 107; LOCAL).—EX PARTE EMILY HAW-
KINS AND A. WOLSTON.(a)

Conversion.—Devisee and Executor.

1843: 6th November.

The Common Council of London, being empowered, by a local act of Parliament, to take a freehold house belonging to A. for the purposes of the act, at the expiration of six months after notice given of their intention to take the same, served A. with the required notice in September, 1840. The amount of the purchase money was afterwards agreed upon, and an abstract of A.'s title was sent to the common council. In April, 1841, he died, having, by his will, dated in 1837, devised his real estate to B. and his residuary personal estate to C.: Held, that the purchase money (which, after A.'s death, was paid into court under the act) was to be considered not as part of his real, but as part of his personal estate; and that, all his debts, &c., having been paid, it belonged to his residuary legatee.

THE first section of the above mentioned act, empowered the Common Council of London to take and use any of the tenements or hereditaments, and to pull down and remove any of the houses or buildings, mentioned in the first schedule to the act, which they might deem necessary or expedient to take, use or pull down and remove for the purposes of the act, at any time at the expiration of six calendar months after notice in writing of the intention to take or use the same, should be given to the owners or occupiers of such tenements or hereditaments.

The seventeenth section enacted that it should be lawful for all bodies corporate, trustees, &c., tenants for life, not only on behalf of themselves, but also on behalf of the persons entitled in remainder, reversion, expectancy or contingency, or for any other future estate or interest, where such persons, whether entitled to the next or any subsequent estate or interest, should not be ascertained or should be incapable of contracting for, selling or conveying the same, and for all other persons whomsoever, who were or should be seised or possessed of or interested in any tenements or hereditaments described *in [570] the first schedule to the act, which, by the common

(a) 1 Collyer, 80.

1843.—*Ex parte Hawkins*.

council should be thought necessary for any of the purposes of the act, to contract for, sell and convey the same to the corporation of London; and that all contracts, conveyances, acts and deeds, which should be made by such bodies corporate, or trustees or other persons as aforesaid, should be valid and effectual in the law, to all intents and purposes whatsoever.

The nineteenth section enacted that all bodies corporate, trustees and other persons thereinbefore capacitated to contract for, sell or convey any such tenements or hereditaments as aforesaid, or any other owners of any such tenements or hereditaments, or any estate or estates, interest or interests therein, might accept and receive such satisfaction or recompense for the value thereof, as should be agreed upon between them and the common council; and, if they could not agree, that the amount should be settled by a jury.

The thirty-fourth section enacted that if any money should be agreed or awarded to be paid for any tenements or hereditaments, or estates or interests therein, taken or purchased by virtue of the powers of the act, which should belong to any body corporate, trustee or other person who had no power to give a valid receipt for the same, or to sell and convey the same premises otherwise than by virtue of the act, such money should be paid into the Bank of England in the name and with the privity of the Accountant-General of the Court of Exchequer, to be placed to his account there, *ex parte* "The Mayor and Commonalty and Citizens of the City of London, trustees of London

Bridge," and should, when so paid in, be applied, under [*571] the direction and with the approbation of *the said court, to be signified by an order made upon a petition to be preferred, in a summary way, by the body or bodies, person or persons who would have been entitled to the rents and profits of the said tenements or hereditaments, in the purchase or redemption of the land tax, or discharge of any debt or debts, or such other incumbrances, as the said court should authorize to be paid, affecting the same tenements or hereditaments, or any other tenements or hereditaments standing settled to the same or the like

1843.—*Ex parte Hawkins.*

uses ; or, where such money should not be so applied, then the same should be invested, under the like direction and approbation of the said court, in the purchase of other tenements or hereditaments, which should be conveyed to the like uses, trusts, &c., as the tenements or hereditaments which should be so taken or purchased as aforesaid, stood settled or limited to, or such of them as should be existing ; and that, until such purchase, the said money should be invested by the said Accountant-General, in his name, in three per cent. stock ; and that, until the stock should be sold for the purposes aforesaid, the dividends should be paid to the body or bodies, person or persons who would, for the time being, have been entitled to the rents of the tenements or hereditaments so thereby directed to be purchased, in case such purchase and settlement were made.

The forty-first section enacted that if any body or bodies corporate, person or persons seised or possessed of, or interested in any such tenements or hereditaments, estate or estates, interest or interests therein as aforesaid, could not be found or should not be known, or should not prove a good title to the premises, or should refuse to execute a conveyance thereof, it should be *lawful for the common council to order the *payment*(a) of such sum or sums of money as should have been contracted and agreed, or should have been assessed and awarded by a jury to be paid for the purchase or for the value of the same premises, to be *paid* into the Bank of England in the name and with the privy of the Accountant-General of the Court of Exchequer, to be placed to his account to the credit of the party or parties interested in the said tenements or hereditaments, estates or interests, (describing such tenements or hereditaments,) or, if such party or parties should not be known, then to the credit of the then unknown person or persons interested in the said tenements or hereditaments, estates or interests, subject to the order, control and disposition of the said court, which, on the application of any body or bodies, person or persons making claim to such sum or sums of money, or any part thereof, by petition, was thereby empowered in a summary way of proceed-

(a) *Sic* in act.

1843.—*Ex parte Hawkins*.

ing or otherwise as to the same court should seem meet, to order the same to be invested in the funds, or to order distribution thereof or payment of the dividends thereof, according to the respective estate or estates, title or interest of the body or bodies, person or persons making claim thereunto, or to make such other order in the premises as to the said court should seem just; and, upon payment of such sum or sums of money into the bank as lastly thereinbefore was mentioned, the tenements or hereditaments, estates or interests for the purchase or as the value of which the same should have been agreed or awarded to be paid, and the fee simple and inheritance thereof, should vest in the Mayor and Corporation of London, and they should be [*573] deemed in law to be in the actual *seisin or possession thereof, to all intents and purposes whatsoever, as fully and effectually as if every body or person having any such estate in the premises, had actually conveyed the same; and such payment should not only bar all right, title, interest, claim and demand of the body or bodies, person or persons to whose credit such payment should have been made, of, in or to the same premises, but also all estates tail and other estates in possession, reversion, remainder, expectancy or contingency, and the issue of such person or persons, and every other body or person whomsoever.

Henry Hawkins, being the owner of a house and warehouse in Lad-lane, (part of the hereditaments mentioned in the first schedule to the act,) the common council, on the 26th of September, 1840, served him with a written notice of their intention to take the house and warehouse for the purposes of the act; and thereby required him to deliver up the possession thereof, at the expiration of six calendar months after the date of the notice. On the 4th of February, 1841, the city surveyor and a surveyor appointed by Hawkins, signed a paper writing, by which they certified the value of the house and warehouse to be 1,300*l.*; and, on the 16th of March following, Hawkins' solicitor sent an abstract of his client's title to the premises, accompanied by a letter desiring that the business might be settled as soon as possible, as Hawkins was in a precarious state of health.

1843.—*Ex parte Hawkins.*

On the 18th of April, 1841, Hawkins died, having, by his will dated the 30th of November, 1837, devised all his lands and tenements to F. Smedley and the petitioner, Wolston, to the use of John S. Hawkins, his brother, and Charles S. Hawkins, his nephew, the son of J. S. Hawkins, *for their [*574] lives, successively, with remainders to the first and other sons of Charles S. Hawkins, successively, in tail male, with remainder to Smedley and Wolston, during the life of Emily Louisa Hawkins, the testator's niece and the daughter of his brother, for her separate use for life, with remainder to the right heirs of his father who should be living at the death of the survivor of his nephew and niece, forever; and the testator bequeathed his residuary personal estate to his brother absolutely, and appointed his brother and nephew his executors. The testator made a codicil dated the 22d of August, 1839, which, like his will, was duly executed and attested; and, thereby, after making certain specific bequests, ratified and confirmed his will.

The testator left his brother his heir, who, together with his nephew, proved his will and paid his debts, funeral and testamentary expenses and legacies. Immediately after his will had been proved, notice of his death was given and a copy of his will was sent to the city comptroller; and, in June, 1841, the comptroller forwarded to Wolston, as the solicitor of J. S. Hawkins and of the testator, a copy of the opinion of counsel approving of the title to the premises on behalf of the common council, but suggesting that, as the testator had contracted for the sale of the premises after the date of his will, a question arose as to the parties entitled to the purchase money, and that, therefore, it ought to be paid into the Court of Exchequer, to await the decision of that court; it being an unsettled point whether, if a testator whose will was made after the passing of the recent will act (7 W. IV & 1 Vict. c. 26) contract for the sale of an estate after he has devised it, the devisee or the residuary legatee is entitled to the proceeds of the sale. On the other hand, a *learned conveyancer, who was consulted on behalf [*575] of J. S. Hawkins, advised that, as the contract for sale of the premises was made, not with the persons claiming under

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the testator's will, but with the testator himself, who was a person capable of giving a valid receipt for the purchase money, and conveying the premises, the purchase money was not authorized to be paid into court by the 2d & 3d Vict. c. 107, but formed part of the testator's personal estate, and was payable to his executors. The counsel for the city rejoined that *a binding contract for the sale of the premises was not entered into by the testator*, and, therefore, the case was one of a tenant for life contracting for the sale under the last mentioned act, and, that being so, the purchase money might be paid into court under the 34th section.

In November, 1841, the common council took possession of the house and warehouse, and afterwards pulled them down.

Further opinions were then taken, and some correspondence took place between the comptroller and Wolston, in the course of which the latter contended that a valid contract for the sale of the premises had been entered into by the testator, and that the purchase money ought to be paid either to his executors, or to J. S. Hawkins as his residuary legatee, or into court under the 41st sect. of the act,(a) and, on the 1st of August, 1842, the money was paid in accordingly.

(a) The following is a copy of one of the opinions given by the counsel for the city:

"The case of *Farrar v. Lord Winterton*, (5 Beav. 1,) is not, in my opinion, decisive of the right of Mr. John S. Hawkins to the money produced by the sale. That case merely decides that, if a testator, having devised an estate by way of settlement, afterwards enters into a contract for the sale of it, the residuary legatee, and not the devisees of the estate, will be entitled to the purchase money. In the present instance the sale was compulsory, and it remains to be decided whether the notice given by the city, although binding upon them, and, therefore, to a certain extent operating as a contract, is to be considered as having the same effect as a contract entered into freely by the testator; which, as being indicative of a change of intention on his part, has been held to amount to a revocation of his will; in other words, whether the city can, merely by giving notice of their intention to take the property under the authority of their act, deprive the devisees of the property, not only of their interest in the land, but also of the value of it; and, contrary to the express intention of the testator, give that value to a third person. I cannot bring myself to think that a court of equity would hold that the will of a testator can be altered by the act of a stranger. The case is, therefore, brought within the 41st section of the act; and,

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*Shortly afterwards, J. S. Hawkins died, having, by [*576] his will dated the 2d of August, 1841, bequeathed his residuary personal estate to the petitioners, in trust for his daughter, Emily Louisa Hawkins, on her attaining twenty-one or marrying; but, if she should die before she had acquired a vested interest, then in trust for his son, Charles S. Hawkins; but if he should die in his *sister's lifetime, and she [*577] should die before she had acquired a vested interest, then in trust for the testator's wife, the petitioner, Emily Hawkins; and the testator appointed her and Wolston his executrix and executor.

In consequence of the jurisdiction of the Court of Exchequer, as a court of equity, having been transferred to the Court of Chancery by 5 Vict. c. 5, sect. 1, Mrs. Hawkins and Wolston presented a petition to the Lord Chancellor, which, after stating as above, prayed that the Accountant-General of the Court of Chancery might be ordered to pay the 1,300*l.* to the petitioners, as the executors of J. S. Hawkins, the residuary legatee of Henry Hawkins.

Mr. Lovat for the petitioners, referred to *Farrar v. Lord Winterton*; *The King v. The Hungerford Market Company*; *The King v. The Commissioners for Improving Market street, Manchester*; H. Sugden on the Act for the amendment of the Law respecting Wills, page 52; 1 Jarman on Wills, pages 45, 46, and 49; and 1 Sugd. Vend. 255; (a) and *Galliers v. Allen*. (b)

under the authority of the cases of *The King v. The Hungerford Market Company*, (4 Barn. & Adol. 327,) and *The King v. The Commissioners for Improving Market Street, Manchester*, (cited in a note to the former case,) which render the notice given by the city binding upon them, and, therefore, to a certain extent, operating as a contract, I would advise the city to pay the sum of 1,300*l.*, the value put upon the premises by the referees, into the Bank of England, in the manner and to the account prescribed by the 41st section of the act, and thus obtain a title to the premises without a jury, and without the necessity of taking any conveyance of them."

(a) See *Midland Counties Railway Company v. Oswin*, 1 Coll. 74.

(b) Not reported. Mr. Lovat's note of that case was, in substance, as follows:

GALLIERS v. ALLEN.

Mary Caswall, by her will dated the 9th of June, 1839, devised her messuage in Bye street, Hereford, to her grandson, the defendant Samuel Caswall, forever; and,

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[*578] *Mr. *Temple* for Charles S. Hawkins, said that the notice given by the common council, of their intention to take the premises in Lad-lane, did not amount to a binding contract within the Statute of Frauds; and, therefore, the 1,300*l.* retained the character of real estate.

Mr. *Wood* appeared for the Corporation of London, and Mr. *F. Rayley* for Smedley, one of the trustees of Henry Hawkins' will.

THE VICE-CHANCELLOR:—In this case the Common Council of the City of London gave notice to the testator, in his lifetime, of their intention to take and use his house and warehouse in Lad-lane, for the purposes of the act for widening the approaches to London Bridge; and the matter afterwards proceeded so far, that the purchase money was paid into court. Under those circumstances, I think that it is impossible not to say that the nature of the property was changed; that is, that the owner of the house and warehouse, became the owner of the money which, subsequently to the giving of the notice, was certified, by his agent and the agent of the common council, to be the value of the property.

[*579] *I think that the decision of Lord Cottenham, in the case of *Sampson v. The University of Cambridge*,^(a) is applicable to the present in all its points.

Although, in this case, there was no binding contract within the Statute of Frauds, I think that there was that which was

after giving other parts of her real estate to another of her grandsons, she gave the residue of her real and personal estate to Samuel absolutely, and appointed the defendant Allen her executor. After the date of her will, but before her death, the house in Bye street, Hereford, was taken by commissioners for the purposes of an act of Parliament, and 350*l.*, which was the portion of the money, paid for the house, to which the testatrix was entitled, was paid into court under the act. At the hearing of the cause for further directions, on the 19th of January, 1843, the question was whether the 350*l.* ought to be considered as real estate, or as part of the personal assets of the testatrix applicable to the payment of her debts. The Vice-Chancellor declared that the 350*l.* was part of the personal estate of the testatrix.

Mr. *Bacon* and Mr. *Shebbears* were counsel in the cause. Reg. Lib. A. 1842, fo. 553.

(a) Not reported.

1843.—Rice v. Gordon.

tantamount to it: for the act made it lawful for the common council to take and use any tenements and hereditaments which they might deem it necessary or expedient to take, use or pull down and remove for the purposes of the act, at the expiration of six months after notice, in writing, of their intention to take or use the same, given to the owners or occupiers thereof. The effect of that provision was to give, to the common council, a parliamentary power to contract for the tenements required for the purposes of the act; and, under the same provision, they had power to enter upon the tenements at law: a much stronger power than could have been given by any private contract between them and the owners of the tenements. Therefore, my opinion is that Henry Hawkins, at the time of his death, was entitled only to the money to be paid for the house and warehouse in Lad-lane.

Having regard to the seventeenth and to the forty-first sections of the act, and to the deaths which took place before the purchase money was paid, I am of opinion that the common council were right in paying it into court, under the latter of those sections.

Declare that the money in court is part of the personal estate of the testator, Henry Hawkins, and that the petitioners are entitled to it as the executors of J. S. Hawkins, his residuary legatee.

*RICE v. GORDON.

[*580]

Production of Documents.

1843: 9th and 16th November.

It is no answer to a motion for production of documents in the custody of a defendant, that they tend to support an indictment pending against the defendant, for perjury committed in the cause.

IN this case an indictment was pending against the defendant, for perjury committed *in the cause*; and, on Mr. Cole for the
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plaintiff, moving for the production of documents which the defendant had admitted, in his answer, to be in his custody,

Mr. *Chandless* contended that he was not bound to produce them, because they tended to support the indictment; and cited *Paxton v. Douglass*.^(a)

THE VICE-CHANCELLOR said that, in the case cited, the offence was committed prior to the institution of the suit; but, in the present case, it was committed in the very cause in which the motion was made; and that, if he were to refuse the motion, he should be holding out an inducement to a defendant to commit perjury in an early stage of the cause, in order to prevent the court from administering justice in the suit.

Motion granted.

(a) 16 Ves. 239.

[*581]

*ABRAHAM v. HANNAY.

Joint Stock Company.—Partnership.—Parties.

1843: 11th November.

A. gave a bond to the public officer of a joint stock banking company, (in which he afterwards became a shareholder,) to secure advances made to him by the company. The bank afterwards suspended their business, and brought an action on the bond in the name of the officer. A. then filed a bill, on behalf of himself alone, against the officer and the directors of the company, praying for an account of the dealings and transactions of the company down to the time when their business ceased, that his share of the capital and profits might be ascertained and set off against the money due on the bond, and that the surplus might be paid to him: Held, that the bill prayed, in effect, for a dissolution of the company, and, therefore, that all the shareholders ought to have been made parties to it.

THE plaintiff having opened an account with a joint stock banking company, and being desirous of obtaining an advance of money from them, executed a bond to the defendant Hannay, (who was one of the registered public officers of the company,) for the purpose of securing what might be due from him to the company: and a few months afterwards, he became a shareholder in the con-

1843.—*Abraham v. Hannay*.

cern. The company subsequently suspended their banking business, and brought an action on the bond, in Hannay's name, to recover 555*l.*, which they claimed to be due to them from the plaintiff.

The bill which was filed against Hannay and the directors of the company, alleged that the plaintiff's share of the capital and profits of the business, exceeded in amount what was due on the bond, and prayed that an account might be taken of the dealings and transactions of the company down to the time when they ceased to carry on business; that the plaintiff's share of the capital and profits might be ascertained and set off against what was due on the bond,^(a) and that *the sur- [*582] plus might be paid to him, the action stayed, and the bond be delivered up to be cancelled.

Two of the defendants demurred for want of parties.

Mr. *Stuart* and Mr. *Wood*, in support of the demurrer, said that all the shareholders ought to have been made parties to the suit; for the plaintiff sought by his bill, (which was filed not on behalf of himself and the other shareholders, but on behalf of himself alone,) to have the affairs of the company wound up, and the bill did not allege that the members of the company were numerous.

Mr. *Wakefield* and Mr. *Lovat*, in support of the bill, said that it was filed against the public officer as representing the company; and that the circumstance of their being forced to manage their affairs by means of directors, showed that they were a numerous body.

Mr. *Stuart* in reply, said that *Seddon v. Cannell*,^(b) decided that a public officer did not represent the company in a suit like the present, where the plaintiff was a shareholder in the company.

(a) The 1st and 2d Vict. c. 98, s. 4, enacts that a member's share of the capital or profits of a joint stock bank shall not be set off against a demand of the company against the member.

(b) *Ante*, Vol. X, p. 58.

1843.—*Emery v. Pickering.*

THE VICE-CHANCELLOR:—What the plaintiff asks by his bill, is, in effect, a dissolution of the company.—[Mr. *Wakefield*: We charge that the company has ceased.]—Although the company has suspended its business, it is still a company: and it is new to me that, where a dissolution is asked, it can be had in the absence of any of the members. Therefore the demurrer must be allowed.(a)

(b) See *Wakworth v. Holl*, 4 Myl. & Cr. 619.

[*583]

*EMERY v. PICKERING.

Impertinence.—Vendor and Purchaser.—Specific Performance.

1843: 15th November.

Before answer to a bill for specific performance, the plaintiff obtained an order of reference as to title. The defendant, under a threat of attachment, put in his answer, in which he alleged that one of the conditions of sale was framed with a fraudulent intent: Held, that that allegation was not impertinent.

THIS was a suit for specific performance.

Before answer, the plaintiff obtained an order of reference as to title; and then compelled the defendant to put in his answer by threatening him with an attachment. The answer contained the following passage: "Moreover, this defendant contends that the fourth condition of sale was framed for the purpose of misleading and entrapping a purchaser." The plaintiff excepted to the answer, on the ground that the above mentioned passage was impertinent.

Mr. *Webster*, in support of the exception, said that, after the order of reference had been obtained, the answer ought to have been confined to the subject of title, and that it was impertinent to allege fraud. *Gompertz v. ———*, (a) *Blyth v. Elmhirst*, (b) *Paton v. Rogers*, (c) *Balmanno v. Lumley*, (d) *Matthews v. Dana*. (e)

(a) 12 Ves. 17.

(d) *Ibid.* 224.

(b) 1 Ves. & Beam. 1.

(e) 3 Madd. 470.

(c) *Ibid.* 351.

 1843.—*Lucas v. Dennison.*

Mr. Bigg appeared for the defendant: but

The VICE-CHANCELLOR, without hearing him, said:—The order of reference does not preclude the defendant from making any defence to the bill that he may think proper. If, as the plaintiff contends, that order had *the effect of [*584] a decree, he ought not to have called for an answer; but, as he thought fit to call for an answer, the defendant was at liberty to make any defence that he pleased. It does not appear on the face of the order of reference, that the defendant did not object to the order being made, or that he said that there was no objection to a specific performance, except the objection as to title. The exception, therefore, must be overruled.

LUCAS v. DENNISON.

Statute of Limitations (3 & 4 Will. IV, c. 27, sect. 28.)—Mortgagor and Mortgagee.—Acknowledgment of Title.

1843: 15th November and 5th December.

A. mortgaged an estate to B. for 1,000 years. B. died, having bequeathed the mortgage to his widow. She also died; and, in 1822, her personal representatives entered into and continued in possession of the estate until 1838, when they sold and assigned the mortgage to C., who entered and continued in possession until 1843, when A.'s heir filed a bill to redeem, on the ground that the deed of assignment recited the mortgage and conveyed the term to C., subject, expressly, to the equity of redemption of A. or his legal representatives: Held, that the deed was not such an acknowledgment of the mortgagor's title as to make the estate redeemable.

In June, 1771, William Hyslop, being seised in fee of a piece of land at Gosport, mortgaged it to John Philcox, his executors, administrators and assigns, for one thousand years, to secure 150*l.* and interest, and afterwards created two further charges thereon. Philcox died in October, 1806, and, under his will, his wife, Sarah Philcox, became entitled to the mortgage as his residuary legatee; and she and T. Mansfield and J. Bridger were his executrix and executors. Sarah Philcox died in March, 1814,

1843.—Lucas v. Dennison.

having bequeathed all her personal estate to T. Mansfield and Henry Mansfield, upon certain trusts, and appointed them her executors.

William Hyslop died in October, 1817, having devised [*585] *all his real estates to J. B. Harding and M. Carter in fee, in trust for the plaintiff, his daughter, then the wife of J. L. Lucas, deceased, for her separate use for life, remainder in trust for such persons, &c., as she should, by deed or will, appoint, remainder in trust for her right heirs; and he appointed Harding and Carter his executors.

The bill, which was filed on the 16th of August, 1843, stated that, upon William Hyslop's decease, the plaintiff being entitled to the equity of redemption of the mortgaged premises, entered into and *continued in possession thereof up to and until 1822: that, at and previous to that year, T. and H. Mansfield, as the executors of Sarah Philcox, applied to the plaintiff to pay off the mortgage and further charges, and, upon her being unable so to do, H. Mansfield, the then surviving executor of Sarah Philcox, shortly afterwards took possession of the premises: that, in September, 1824, William Mansfield, a son of Henry Mansfield, entered into the occupation of the premises as tenant, and continued in such occupation until the 29th of September, 1838: that, on the 31st of August preceding, Richard Mansfield, John Carpenter and Ann Maria, his wife, the then personal representatives of Sarah Philcox, sold the principal and interest due on the mortgage and further charges, to the defendant Dennison; and, by an indenture dated the 29th of November, 1838, and made between J. L. Anderson, of the first part, Richard Mansfield, and Carpenter and his wife, of the second part, and Dennison, of the third part, after reciting the mortgage and further charges, and other matters to show that Anderson had become the personal representative of Philcox, the original mortgagee, and Richard Mansfield and Carpenter and his wife, the personal representatives of his*

[*586] widow; *and that 270*l.* remained due on the securities, and that the equity of redemption had not been barred; and that Dennison had purchased the securities and heredita-

1843.—Lucas v. Dennison.

ments thereinbefore described, for 100*l.*: It was witnessed that the parties thereto of the first and second parts assigned the mortgaged premises to Dennison, for the residue of the term created by the deed of June, 1771, subject to such right and equity of redemption as the same premises were then subject to; and the parties of the second part assigned to him, the principal and interest then due and thereafter to become due under the indentures of mortgage and further charge, and appointed him their attorney to recover and receive the same.

The bill further stated that the plaintiff was the heir and sole next of kin of Hyslop, the mortgagor: that Harding and Carter had refused either to prove his will or to act in the trusts thereof; that Dennison entered into possession of the mortgaged premises, some time in September, 1838, and had ever since continued in possession thereof: and it prayed for a redemption of the premises in the usual terms where the mortgagee has been in possession.

Dennison put in a plea to the whole of the bill, except that part of it which related to the sale and assignment to himself, and his having entered into and continued in possession of the mortgaged premises.

The plea was as follows:—"That, by an act of Parliament made and passed in the 3*d* and 4*th* years of the reign of his late Majesty, King William the Fourth, entitled an act for the limitation of actions and suits relating to real property, *and for simplifying the remedies for trying the rights [*587] thereto, it is enacted that, when a mortgagee shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent comprised in his mortgage, the mortgagor or any person claiming through him, shall not bring a suit to redeem the mortgage but within twenty years next after the time at which the mortgagee obtained such possession or receipt, unless, in the meantime, an acknowledgment of the title of the mortgagor or of his right of redemption, shall have been given to the mortgagor or some person claiming his estate, or to the agent of such

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mortgagor or person, in writing, signed by the mortgagee or the person claiming through him. And this defendant doth aver that, previously to the time when Henry Mansfield, in the said bill mentioned to be, as he in fact was, the surviving executor of Sarah Philcox therein mentioned, the residuary legatee under the will of John Philcox, therein also mentioned, entered into possession of the mortgaged premises in the said bill described, which entry took place, as in the said bill mentioned, in the year 1822, being upwards of twenty years before the filing of the said bill, all the debts and pecuniary legacies of the said John Philcox had been fully paid and satisfied; and that, at the time of the aforesaid entry, the principal moneys and interest secured by or under the several indentures of mortgage and further charge in the said bill respectively mentioned, formed part of the clear, residuary personal estate of the said John Philcox, and the entire beneficial interest under the same indentures of mortgage and further charge, was, consequently, at the time of such entry, vested in the said Henry Mansfield as executor of the said Sarah Philcox as aforesaid, and that the said Henry Mansfield, accordingly, [*588] entered into possession of the said mortgaged *premises as executor as aforesaid, with the privity and assent, and under the authority of John Bridger in the said bill mentioned, who was the then only surviving executor and sole legal personal representative of the said John Philcox: and this defendant doth aver that, since the said entry of the said Henry Mansfield, no acknowledgment of the title of the said plaintiff, or of her right of redemption, or of the title or right of redemption of any person claiming the estate of William Hyslop, the mortgagor in the said bill named, has been given to the said plaintiff, or to such other person, or to the agent of the said plaintiff or other person, in writing, signed by the said Henry Mansfield, or by this defendant, or by any other person claiming through the said John Philcox: and this defendant doth plead the said act of Parliament and the matters hereinbefore averred, to so much of the said bill as is hereinbefore pleaded to, and humbly prays the judgment of this court whether he ought to make any further answer to so much of the said bill as is hereinbefore pleaded to."

1843.—Lucas v. Dennison.

The defendant then proceeded to answer the residue of the bill. The answer contained an admission that the deed of November, 1838, was duly made and executed, of such date, between such parties, and to such purport or effect as in the bill stated.

The plea now came on to be argued.

Mr. Willcock and Mr. Thomas Turner, in support of it, said that the deed of assignment was not: "an acknowledgment of the title of the mortgagor or of his right of redemption, given to the mortgagor, or to some person claiming his estate." It was prepared for and was the property of the purchaser, and the mortgagor *was not a party to it.—[THE VICE-CHANCELLOR:—The words of the act are: "to the mortgagor or some person claiming his estate:" was not the purchaser a person claiming his estate?—No: the purchaser was claiming the estate of the mortgagee: and, if the deed in this case is held to be an acknowledgment, the object of the act will be defeated; for any dealing by a mortgagee with the mortgaged estate will prevent the operation of the act. [*589]

The plea alleges possession of the estate to have been obtained and continued for more than twenty years; and it negatives the giving of any such acknowledgment as the act requires to take the case out of its operation.

Mr. Bethell and Mr. Briggs, in support of the bill, said that the plea was insufficient; for it did not aver what the act required, namely, a continuous possession or receipt of the profits of the mortgaged estate, by the mortgagee, for twenty years.

The VICE-CHANCELLOR, having taken time to read through the record, stated the substance of the plea, and added that the only acknowledgment of the mortgagor's title, was that which was contained in the deed of assignment to the defendant; and that he did not think that was a sufficient acknowledgment to make the mortgaged estate redeemable.

Plea allowed, with liberty to the plaintiff to amend, within three weeks.

 1843.—Lekh v. Legh.—Ex parte Mills.

[*590]

LEGH v. LEGH.

Practice.—New Orders.—Service of Copy Bill.

1843: 16th November.

Held, on a motion for leave to enter a memorandum of service of copy bill, that it is not necessary for plaintiff to swear that he examined the copy either with the office copy or the record. An affidavit that he believes it to be a true copy is sufficient.

MR. HEBERDEN moved, under the 24th order of August, 1841, for leave to enter a memorandum of service of a copy of the bill. He read an affidavit in which the plaintiff deposed that, on the 31st of July, 1843, he personally served the defendant with a copy of the bill, (excepting the interrogating part,) by delivering to and leaving with the defendant a true copy of the office copy; and which copy the plaintiff believed to be a correct copy of the bill. He referred to *Penfold v. Bouch.*(a)

The VICE-CHANCELLOR granted the motion, saying that, if the plaintiff swore that the copy served was a true copy of the bill, it was not necessary for him to swear that he had examined it either with the office copy or with the record.

(a) 2 Hare 157.

[*591]

*EX PARTE MILLS.

Practice.—Construction of 3 & 4 Vict. c. 55.—Draining Settled Estates.

1843: 17th November.

The court is *functus officio* when it has confirmed the master's report sanctioning the draining of a settled estate, under 3 and 4 Vict. c. 55. What remains to be done under the act is to be done by the master and not by the court.

THIS was a petition presented, under the 3d & 4th Vict. c. 55,(a) after the master had reported in favor of the improvements proposed to be made under the act.

(a) To enable the owners of settled estates to defray the expense of draining the same by way of mortgage. The first section enables tenants for life, &c., to apply,

 1843.—Beales v. Crisford.

The VICE-CHANCELLOR confirmed the report; and said that everything that was to be subsequently done under the act, was to be done by the master, and no further application was to be made to the court.

*On *Stanhope v. Stanhope*(a) being cited, his Honor [*592] said that there were special circumstances in that case, which might have rendered a further application to the court, necessary.

Mr. *Freeling* supported the petition.

by petition, to the Court of Chancery or the Court of Exchequer, for leave to improve their estates, by draining the same in a permanent manner. The second section enacts that, if the master shall report in favor of the proposed improvements, and the court shall confirm his report, it shall be lawful for the tenant for life to make the improvements. The fourth section enacts that when the improvements, or any part thereof, shall have been made, it shall be lawful for the master, by a certificate to be filed in the court, on having satisfaction that the money has been properly expended, to authorize the tenant for life, &c., to charge all or any part of the lands drained, or any other lands subject to the like uses or trusts, with the payment, to any person willing to advance the same, of the amount of the money expended, with interest not exceeding five per cent.; the principal to be paid off by not less than twelve nor more than eighteen yearly instalments, the number of them to be determined by the master and recommended in his report, and to be diminished or increased at his discretion, according to the greater or less improvement shown to have been made by such draining; and the interest to be kept down by the tenant for life.

(a) 3 Beav. 547.

BEALES v. CRISFORD.

Will.—Construction.—"Family."—"Cash or Moneys so Called."

1843: 17th November.

A testatrix, in her will, used the following expression: "Observing that F. Beales and his family are my residuary legatees for all but cash or moneys so called." F. Beales had nine children living at the date of the will and at the testatrix's death, and the testatrix died possessed of a promissory note payable to herself or order, some long annuities, Columbian bonds and money in her house and at her banker's: Held, that by "Francis Beales and his family," the testatrix meant

 1843.—Beales v. Orisford.

Francis Beales and his children, and that they took the note, annuities and bonds as joint tenants, those articles being neither cash nor moneys so called.[1]

THE will of Sarah Beales, the testatrix in the cause, was singular, throughout, both in form and language. It contained the following amongst other passages :

"Observing that Francis Beales *and his family* are my residuary legatees for all but *cash or moneys so called*. I had much love for Batson, my father's third son : he was always a kind of fag to me. Those persons are his blood ; honest, industrious and, what I have ever prized, nobles by nature ; what I give them would be nothing worth, but in careful, perhaps, like them, necessitous hands. They are, I believe, worthy people, and, as such, I sincerely pray God to bless the sweat of their brow."

The testatrix's estate consisted, in part, of cash in her house and at her banker's, long annuities, Columbian bonds, and a promissory note dated prior to her will and payable to herself or order.

[*598] *The decree at the hearing of the cause having directed the master to inquire and state whom the testatrix meant by, "Francis Beales and his family," the master reported that the testatrix, at the time of making her will, had a relation named Francis Beales, (a plaintiff in the suit,) who was the son of Henry Batson Beales, a half-brother of the testatrix ; and that Francis Beales had nine children, all of whom were living at the date of the will and at the death of the testatrix.

At the hearing of the original cause for further directions, and of the supplemental cause, by which the children of F. Beales were brought before the court,

Mr. *Stuart* and Mr. *Forster* for Francis Beales, contended, first, that, under the residuary gift, their client was absolutely and solely entitled, to the exclusion of his children ; and, secondly,

[1] See 1 Sim. (N. S.) 246, *Parkinson's Trust*. The Vice-Chancellor says that the will, in this case, is so strangely worded, that it is hardly an authority for anything.

 1843.—*Beales v. Crisford*.

that the Columbian bonds, long annuities and promissory note were included in that gift. They cited *Robinson v. Waddelow*,^(a) and *Robinson v. Tickell*,^(b) in support of the first proposition; and *Read v. Stewart*,^(c) *Dowson v. Gaskoin*,^(d) and *Fleming v. Brook*,^(e) in support of the second.

Mr. Wood for the children of Francis Beales, cited *Macleroth v. Bacon*,^(g) *Barnes v. Patch*,^(h) *De Witte v. De Witte*,⁽ⁱ⁾ and *Stuart v. Lord Bute*.^(k)

Mr. Beales and Mr. Moore appeared for other parties.

*The VICE-CHANCELLOR, after remarking that it was [*594] evident, from some of the passages in the will, that the testatrix thought that she might have used language that was not very intelligible, said that, when the testatrix observed that Francis Beales and his family were her residuary legatees, she, evidently spoke of more persons than Francis Beales: that it was plain, from the next passage, that she was speaking of persons who were living at the date of her will; and, as the master had found that Francis Beales had nine children who were living at that time, there was quite sufficient to authorize the court to hold that by, "Francis Beales and his family," the testatrix meant Francis Beales and his children who were living at the time when she made her will.

With respect to the other point in the cause, his Honor said that the case was unlike the cases that had been cited; for the question was not what was the meaning of the term "money;" but what was meant by the expression: "cash or moneys so called;" and that he did not think that either the promissory note, the long annuities or the Columbian bonds, could be said, with propriety, to be either cash or moneys so called; and, therefore, they were not excepted out of the residuary gift.

(a) *Ante*, Vol. VIII, p. 134.

(b) 8 Ves. 142.

(c) 4 Russ. 69.

(d) 2 Keen, 14.

(e) 1 Scho. & Lef. 318.

(g) 5 Ves. 159.

(h) 8 Ves. 604.

(i) *Ante*, Vol. XI, p. 41.

(k) 11 Ves. 657.

1843.—Harrison v. Andrews.

"Declare that Francis Beales and his children living at the death of the testatrix, are her residuary legatees, and that, as such, they are entitled to the promissory note, the long annuities, and the Columbian bonds, *as joint tenants*."

[*595]

*HARRISON v. ANDREWS.

Legacy.—Discharge.

1843: 20th November.

A. agreed that a legacy given to his wife should be set off against a sum of the same amount, which he owed to the testator on his promissory note; and he and his wife signed a *receipt* for the legacy; but it did not appear that the executors had delivered up the note to him. A. afterwards died, leaving his wife surviving: Held, that she was entitled to be paid the legacy, no *release* having been given for it by her husband.

IN this case it appeared that the testator in the cause, had given a legacy of 100*l.* to the wife of one Waters, and that Waters had agreed, with the executors, that the legacy should be set off against the sum of 100*l.* which was due to the testator's estate on his promissory note; and he and his wife signed a *receipt* for the legacy; but it did not appear that the executors had delivered up the note to him.

Waters afterwards died, leaving his wife surviving.

THE VICE-CHANCELLOR held that Mrs. Waters was entitled to have the legacy paid to her, as nothing but a *release* by her husband, or payment of it to him, could be a discharge of it as against his surviving wife.

The counsel in the cause were Mr. *Stuart*, Mr. *Cooper*, Mr. *Koe*, Mr. *Stinton*, Mr. *Cooke*, Mr. *Rogers*, Mr. *Glasse*, Mr. *Freeling* and Mr. *Southgate*.

1843.—Hartley v. Gilbert.

*HARTLEY v. GILBERT.

[*596]

Commission of Lunacy.—Practice.—Staying Proceedings in a Suit.

1843: 20th November.

After decree, a commission of lunacy issued against the plaintiff, who, being a married woman, was suing by her next friend. The court, on the application of her husband, a defendant, stayed the proceedings in the suit until the result of the proceedings under the commission was known.

MOTION by the defendant Hartley, after decree, that all proceedings in the suit might be stayed until after the opening of a commission of lunacy issued against his wife, (who was the plaintiff in the cause, suing by her next friend,) and until the result of the inquiries directed by the commission, was known.

Mr. Bethell and Mr. Walford supported the motion.

Mr. Wakefield opposed it, for the next friend, and

Mr. Stuart appeared for one of the defendants.

THE VICE-CHANCELLOR:—The only question is whether I shall allow a sort of fraud (using that word in the sense in which it is used in this court) to be practiced on the jurisdiction in lunacy.

Prima facie there is good ground for supposing that the suit, instead of being conducted by the next friend, will be conducted under the jurisdiction in lunacy. Therefore, nothing ought to be done in the master's office, until the court has been informed what has been the result of the proceedings under the commission of lunacy.

Order made.

1843.—Williams v. Owen.

[*597]

*WILLIAMS v. OWEN.

Surety.—Mortgagee and Surety.—Tacking.

1843: 21st November.

A. made a mortgage to B., and, by the same deed, A. and C., his sureties, covenanted for payment of the mortgage money. B. recovered the amount from C., previously to which he lent a further sum to A., and took a further charge for it on the mortgaged property: Held, that C. could not compel B. to assign the mortgage to him unless he paid off the further sum.

ROBERT ROBERTS mortgaged leasehold property to David Evans, to secure 300*l.* and interest, and, by the same deed, joined with three persons, his sureties, in covenanting to pay the principal and interest to Evans. Evans took a further charge on the property, for securing 100*l.* and interest, and afterwards recovered the money due on the mortgage from the sureties.

The suit was instituted by the sureties; and the question was, whether they were bound to pay off the 100*l.* and interest, in order to entitle themselves to have the mortgage assigned to them.

Mr. *Purvis* and Mr. *Heathfield* for the plaintiffs, said that, if a surety paid the debt of his principal, he was entitled to the benefit of the securities held by the creditor, and that the creditor had no power to prejudice the rights of the surety, by engaging in another transaction with the principal, to which the surety was not privy; and, therefore, Evans was not entitled to tack his further charge to his mortgage. *Copis v. Middleton.*(a)

Mr. *Stuart* and Mr. *Piggott* for Evans, said that the right which the sureties had, was to stand in precisely the same situation as the debtor was in at the time when the debt was paid off; and as, at that time, the creditor had a right, as against his debtor, to tack his further charge to his mortgage, he had the same
 [*598] right as *against the sureties; and, therefore, they must

(a) Turn. & Russ. 224.

 1843.—Lord Hatherton v. Bradburne.

pay off the further charge, before they could call upon the creditor to assign the mortgage to them. *Hodgson v. Shaw.*(a)

Mr. *Bagshawe* appeared for Robert Roberts.

THE VICE-CHANCELLOR:—The equity of redemption was reserved to the mortgagor and not to the sureties. Their suretyship was created by the covenant at the end of the deed, and there was no stipulation in it that prevented the mortgagee from making the further advance. Therefore there was nothing to prevent the mortgagee from lending a further sum of money to the mortgagor. And, that being so, the right of the sureties to stand in the place of the mortgagee, was subject to the right of the mortgagee to make a further loan to the mortgagor, and to take a further charge on the property, for securing it. Under these circumstances my opinion is that the sureties must pay off the 100%. and interest, as well as the 300%. and interest, in order to entitle themselves to have the mortgage assigned to them.

(a) 3 Myl. & Keen, 183.

*LORD HATHERTON v. BRADBURNE.

[*599]

Lease of Mines.—Heir and Executor.—Rent.—Deed.—Construction.

1843: 21st November.

A., being seised in fee of lands, under which were coal, iron, &c., and the surface of which was in the occupation of a tenant, executed a deed by which he sold and disposed of and granted and conveyed the mines under the land to B., for 99 years subject to the payment to A., his executors, administrators and assigns, of 7,998l., by twelve yearly instalments, which were secured by powers of distress and entry reserved to him, his executors, administrators and assigns; and the latter power provided that, upon an entry being made, the grant and conveyance and the term thereby granted, and everything contained in the deed, on the part of A., his heirs, executors or administrators, should cease, and that A., his heirs, executors, &c., should not be accountable to B. for any of the instalments or sums of money which B. should have then paid in part of the purchase money for the minerals. The subsequent part of the deed contained a covenant enabling B., at the end of the tenant's term, to enter upon the surface lands and to hold them for 99

 1843.—Lord Hatherton v. Bradburne.

years, under the yearly *rent* of 110*l*, which, as well as the power of distress by which it was secured, was reserved to A., *his heirs* and assigns: Held, that the instalments payable for the mines were not rent, and, therefore, not incident to the reversion, but personal debts due from B. to A.

ROBERT HILL and Richard Rothwell being seised in fee, as tenants in common in equal shares, of a messuage or tenement, farm, lands and hereditaments in the parish of Sedgley, in Staffordshire, and of all the mines of coal, ironstone, stone, clay, and other mines and minerals in and under the same, executed a deed dated 24th July, 1807, whereby, in pursuance of the agreement therein mentioned, and in consideration of 2*l*. paid to each of them by Samuel Fereday and John Wilkinson, and in consideration of the further sum of 7,998*l*. to be paid by Fereday and Wilkinson, their executors, administrators or assigns, to Hill, his executors, administrators and assigns, by the instalments and in manner thereafter expressed, and also in consideration of the like further sum of 7,998*l*. to be paid by Fereday and Wilkinson, their executors, administrators or assigns, to Rothwell, his executors, administrators and assigns, by the instalments and in manner thereafter expressed, Hill [*600] and Rothwell sold *and disposed of, and granted and conveyed to Fereday and Wilkinson, their executors, administrators and assigns, all the mines, veins and seams of coal, iron, ironstone, stone and clay in, under or upon all and every or any of the house, buildings, lands, closes, grounds, or hereditaments thereafter particularly described, and containing, by estimation, the several quantities thereafter mentioned, that is to say the house and homestead, one acre, one rood and two perches, Crofts Leasow, two acres, one rood and fifteen perches, &c., &c., all which house, buildings, lands and premises were then in the occupation of Benjamin Brazier, and contained, in the whole, fifty-seven acres: to hold the same mines, veins and seams of coal, iron, ironstone, stone and clay, unto Fereday and Wilkinson, their executors, administrators and assigns, from the date of the deed, for 99 years, under and subject to the payment of the said 7,998*l*., to Hill, his executors, administrators and assigns, on the days and times, by the several instalments and in manner thereafter mentioned, that is to say, on the 29th of September,

1808, and on every following 29th of September, (except as after mentioned,) until the whole of the said 7,998*l.* should be fully paid, the sum of 666*l.* 10*s.*, and the further sum of 280*l.* for every acre exceeding four acres and three quarters, (and so proportionably for any greater or less quantity than an acre,) from or under which any of the said minerals thereby *sold and conveyed*, should be gotten in any one year: except that, on the last of the days appointed for the said payments, such sum only should be paid as should then remain due of the said 7,998*l.* to Hill: and subject to the like payments to Rothwell, his executors, administrators and assigns. The deed then contained the following provisoes:

*“Provided in case default shall be made in payment of [*601] any of the said instalments of the said respective sums of 7,998*l.* at the several days and times and in manner hereinbefore mentioned, for the space of thirty days next after any of the said days on which the same shall respectively become due or ought to be paid as aforesaid, that, then and in such case and so often as the same shall from time to time happen, although no actual demand shall have been made, it shall and may be lawful to and for the said Robert Hill and Richard Rothwell, their respective executors, administrators or assigns for the time being, or their agent or agents, from time to time to enter into and upon the said lands hereinbefore mentioned or any part thereof, or into or upon the said mines in or on the said lands or any of them, and to distrain for the said instalments and all arrears thereof, and all the gins, tackling, ropes, cords, winds, engines, effects and other property there being, coal, iron, ironstone, stone and clay then gotten and there being, to take, seize, sell and dispose of in such manner as distresses for rent in arrear can or may be, by law, taken, seized, sold and disposed of, until the said instalments or payments, and all arrears thereof, together with full and lawful interest for the same from the day or days on which the same accrued due or ought to be paid, and all costs, charges and expenses attending such entry, distress and sale from time to time, shall be fully satisfied and paid: Provided likewise that, in case any of the said instalments and all arrears thereof shall not be

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fully paid or satisfied within sixty days next after the same shall accrue due or become payable as aforesaid, although no actual demand shall have been made, then and in such case it shall and may be lawful to and for the said Robert Hill and

[*602] Richard Rothwell, their *respective executors, administrators or assigns for the time being, or for any person or persons on their behalf or by their order or direction, to enter into and upon the said mines of coal, iron, ironstone, stone and clay hereby granted, or any of them or any part thereof in the name of the whole, and to seize and take the engines, buildings, implements and utensils used in working the said mines, and the same to have, hold and enjoy, and the coal, iron, ironstone, stone and clay in the said mines or on the said premises then being, to get, take, carry away, sell and dispose of, and fully to work the said mines in such and the like manner, in all respects, as if this indenture had never been made or executed, and the profits arising and to arise thereby, and every part thereof, to receive and take to and for the sole use and benefit of the said Robert Hill and Richard Rothwell, their respective executors, administrators and assigns for the time being, without giving or rendering any account thereof, or being compellable to permit the book or books of account of the, reckoning bailiff or bailiffs to be examined, or inspected by the said Samuel Fereday and John Wilkinson, their executors, administrators or assigns; and, from and after such last mentioned entry shall be made, the grant *and conveyance* hereby made, and *the term hereby granted*, and every clause, matter and thing herein contained on the part and behalf of the said Robert Hill and Richard Rothwell, their respective heirs, executors or administrators, shall cease and determine and become utterly void and of none effect: And also that, from and after such last mentioned entry shall be made, the said Robert Hill and Richard Rothwell, their respective *heirs*, executors, administrators and assigns, shall not, on any account or under any pretence whatsoever, be accountable for, or be compellable to refund or repay, to the said

[*603] Samuel *Fereday and John Wilkinson, their executors, administrators or assigns, any of the instalments or sums of money which shall then have been paid, by him or them, in part of

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or towards *the purchase money* for the said minerals or mines hereby assigned or intended to be *sold, granted and conveyed.*"

And, in consideration of the premises, Hill and Rothwell for themselves, and their respective heirs, executors and administrators, covenanted and agreed with Fereday and Wilkinson, their executors, administrators and assigns, that it should be lawful for Fereday and Wilkinson, their executors, administrators and assigns, upon the 25th of March, 1808, (when the term of the then tenant in the buildings and lands thereinbefore described, might, on notice given him be determined,) to enter into and upon the same buildings and lands as tenant or tenants of the same buildings and of the surface of the same lands, and take the rents, issues and profits thereof for the term of 99 years from thenceforth, under the rent thereafter mentioned, without the let, suit, trouble or interruption of Hill and Rothwell, their or either of their heirs or assigns, or any person or persons claiming or to claim by, from, through or under them or any of them.

And, for the considerations aforesaid, Fereday and Wilkinson, for themselves, their and each of their heirs, executors, administrators and assigns, covenanted with Hill and Rothwell, their heirs, executors and administrators, that Fereday and Wilkinson, their executors, administrators and assigns, would make and pay unto the tenant then occupying the same buildings and lands, full recompense and satisfaction for all damages and trespasses which should or might be done or committed, on the said premises, at any time or times before **that day or* [*604] afterwards during the time he continued tenant thereof, in searching or digging for, or getting or working the said minerals and mines thereby expressed or intended to be *sold and conveyed*, or in exercising any of the powers or authorities thereby given, or otherwise relating thereto, in case they should agree with the tenant for leave to search, dig for, get and work the said minerals and mines before the said day, and would save harmless and keep indemnified Hill and Rothwell, their heirs, executors, administrators and assigns, from all claims and demands whatsoever, for or in respect of such entry, damages or trespasses.

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And also that Fereday and Wilkinson, their executors, administrators or assigns, would, from and after the 25th day of March, 1808, during the aforesaid term of ninety-nine years from thenceforth, and for so long time as they should continue tenant or tenants of the said buildings and lands, and until the said lands should be levelled and restored in manner thereafter mentioned and the possession thereof relinquished to Hill and Rothwell, their respective heirs or assigns, yearly and every year, pay or cause to be paid to Hill and Rothwell, their *heirs or assigns*, the clear annual sum of 110*l.*, in equal moieties, (being the amount of the then present surface rent for the said lands and premises,) by equal half-yearly payments, the first payment thereof to be made on the 29th day of September, 1808; and further that Fereday and Wilkinson, their executors, administrators or assigns, would keep and leave the house and buildings on the said premises in good repair; and, at the end or sooner determination of the demise, would deliver up peaceable possession of the said house, buildings and premises, to Hill and Rothwell, their heirs and assigns.

[*605] *And it was provided that, in case default should be made in payment of the said yearly sum of 110*l.* in the proportions and in manner aforesaid, to Hill and Rothwell, their respective heirs and assigns, for thirty days next after any of the days on which the said half-yearly payments should become due, then, although no actual demand should have been made, it should be lawful for Hill and Rothwell, and their respective heirs or assigns, from time to time to enter into and upon the said messuage and lands or any part thereof, or into or upon the mines in or on the same lands, and to distrain for the said half-yearly payments and all arrears thereof, and all the gins, tackling, ropes, cords, winds, engines, effects and other property there being, and the coal, iron, ironstone, stone and clay then gotten and there being, to take, seize, sell and dispose of, in such manner as distresses for rent in arrear might be, by law, taken, seized, sold and disposed of, until the said half-yearly payments and all arrears thereof, and all costs, charges and expenses at-

tending such entry and distress and sale, should be fully satisfied and paid.

Robert Hill made his will, dated the 14th of January, 1808, which was in part as follows: "I give and devise unto William Mott, his heirs and assigns, all that my undivided part and share of and in all that messuage or tenement, lands, hereditaments and appurtenances thereto belonging, situate in the parish of Sedgley, in the county of Stafford, now in the occupation of Benjamin Brazier, and which messuage, lands, and the mines under the same, are leased to Messrs. Fereday and Wilkinson for the term of ninety-nine years: also I give and bequeath unto the said William Mott, three of the instalments to be paid and payable *by the said Messrs. Fereday and Wilkin- [*606] son, *or the amount thereof in case they or any of them shall be paid in my lifetime*: I also give to my friend, Charles Allport, the sum of 100*l.*: I also give to the Rev. Thomas Bradburne, the sum of 400*l.*: also I give and bequeath, out of the remainder of the instalments for the said mines when paid, the sum of 500*l.* towards building and consecrating a chapel at Wall aforesaid: and all the rest, residue and remainder of the instalments for the said mines, to be paid by the said Messrs. Fereday and Wilkinson, and of my personal estate whatsoever, I give and bequeath to the said William Mott and Samuel Bradburne, to be equally divided between them: and lastly, I nominate and appoint the said William Mott and Samuel Bradburne joint executors of this my last will and testament."

The testator died on the 19th of August, 1812, having received the four first instalments of 66*l.* 10*s.* each, which became payable to him under the deed of July, 1807. After his death, William Mott received the four next instalments and converted three of them to his own use, in satisfaction of the bequest made to him as before stated.

By the settlement on the marriage of John, the only son of William Mott, with Henrietta Oakley, dated in May, 1814, William Mott conveyed to the plaintiffs his undivided moiety of and

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in the messuage or tenement, barn, stables, gardens, farms, lands, hereditaments and appurtenances, and of the several pieces and parcels of arable, meadow and pasture land thereto belonging, called the house and homestead, Crofts Leasow, &c., &c., situate in the parish of Sedgley and county of Stafford, containing [*607] fifty-seven acres, *theretofore in the possession of Benjamin Brazier, and then of Messrs. Fereday and the executors or assigns of John Wilkinson, deceased, and then *in lease*, for a long time to come, to Messrs. Fereday and Wilkinson to get the mines and minerals in and under the same which had been theretofore *sold* to them; and the reversion, rents, issues and profits thereof; and all the estate, &c., of the said William Mott: to hold the same to the plaintiffs in fee, to the use of John Mott for his life, with remainder to the use of the plaintiffs, during his life, in trust to preserve, &c., with remainder to the use of Henrietta Oakley for life, with remainder to the use of the plaintiffs during her life, in trust to preserve, &c., with remainders to the use of the sons of the marriage, successively, in tail male.

William Mott, by his will dated the 19th of February, 1825, devised all his real estates to the plaintiffs and the Rev. T. C. Fell and A. Blandy since deceased, in trust for and to the use of his son, John Mott, for life, remainder in trust for and to the use of his grandson William Mott, the son of John Mott, for life, remainder in trust for and to the use of the sons of William Mott, the grandson, successively, in tail male: and he bequeathed his residuary personal estate to the plaintiffs and Fell and Blandy, in trust to invest the same in the purchase of freehold lands to be conveyed to them in fee, in trust for John Mott, for life, with remainder in trust for William Mott, the grandson, for life, with remainders in trust for the sons of William Mott, the grandson, successively, in tail male; and he directed that, until the trust fund should be invested in land, it should be laid out on the usual securities in the names of the trustees, and the income be paid to the persons who would have been entitled to [*608] the rents of *the lands if purchased: and he appointed his son sole executor of his will.

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On the 12th of April, 1825, William Mott, the testator, re-executed his will, and, on the 12th of September following, he made a codicil, by which he bequeathed to his son John Mott, such book debts as should be owing to him at his death, and then ratified and confirmed his will. He died on the 6th of May, 1826.

In September, 1880, the four last instalments payable to Hill under the deed of July, 1807, were paid, with interest, to Samuel Bradburne as his surviving executor; and Bradburne retained one moiety of the amount, for his own use, and invested the other moiety in consols. He died in February, 1883, having appointed his sons, Thomas and Randle, his executors, but the latter alone proved his will, and thereby became the personal representative of his father and also of Robert Hill.

The bill, after stating as above, alleged that the debts, funeral and testamentary expenses of Robert Hill, and all the legacies given by his will, other than the share in the four last instalments bequeathed to William Mott, the grandfather, had been long since paid; and that the consols in which a moiety of the amount of those instalments had been invested as before mentioned, and the dividends accrued due thereon, constituted clear funds in the hands of Randle Bradburne, subject to no liability whatever except the obligation to transfer and pay the same to the parties claiming under William Mott, the grandfather, who should appear to be entitled thereto: that the plaintiffs as well as Randle Blackburne had been advised *by [*609] counsel that the late William Mott's moiety of the four last instalments, passed to them by the conveyance made by the settlement of May, 1814; but R. Bradburne refused to transfer the consols in which that moiety had been invested, or to pay the dividends accrued due thereon, to the plaintiffs, unless he should be directed so to do by the decree of the court: that John Mott and Henrietta, his wife, and their son William Mott, the tenant in tail male under the settlement, and William Kynaston Mott, the only son of the latter and the tenant in tail male of the lands devised and directed to be purchased by the will of the

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late William Mott, and T. C. Fell, also claimed interests in the consols and dividends.

The bill prayed for a declaration that the late William Mott's moiety in the four last instalments, passed by the conveyance made by the settlement of May, 1814, and that Randle Bradburne might be ordered to transfer and pay the capital and dividends of the consols to the plaintiffs, upon the trusts of the settlement, and that the rights and interests of all parties in and to the same might be ascertained and declared by the court.

Randle Bradburne stated, in his answer, that four eminent counsel had been consulted upon the question raised by the bill; that three of them (one being the late Mr. Bell) thought that the four last instalments payable to Hill, passed by the settlement of May, 1814; but the other learned counsel thought that all those instalments passed by William Mott's will.

The cause now came on to be heard.

[*610] Mr. *Bethell* and Mr. *Craig* for the plaintiffs, the *trustees of the settlement, said that the question which arose on the deed of July, 1807, was, whether the instalments which were unpaid at the date of the settlement, were rent reserved in respect of the premises therein comprised, or whether they were unpaid purchase money; that, if they were the former, they would pass by the settlement, under which William Mott, the grandson of the late William Mott, was entitled to the first estate of inheritance; but, if they were the latter, they would pass by the late William Mott's will, under which his great-grandson, William Kynaston Mott, was entitled to the first estate of inheritance.

Mr. *Purvis* and Mr. *Greene* appeared for Randle Bradburne, the personal representative of Robert Hill, but took no part in the argument.

Mr. *Wakefield* and Mr. *Shadwell* for John Mott and Henrietta,

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his wife, and their son William Mott, said that the deed of July, 1807, was a demise of the mines for ninety-nine years; for it contained powers of distress and entry, and covenants similar to those usually inserted in leases; that it was of no importance that the parties had used the word "instalment" instead of "rent;" that it was competent to them to reserve a very high rent during the first years of the term and none afterwards; that, though the rent and the powers of distress and entry, were reserved to the *executors* of the lessors, their *heirs* would be entitled to receive the rent and to exercise the powers; that the provision in the deed, that, in case the grant should be determined by the entry of the lessors, they, their *heirs*, executors, &c., should not be compellable to refund any of the instalments that they might have received, further showed that the parties intended not to sell, but to lease the mines. Litt. sect. 229.

*Mr. *Koe* and Mr. *Freeling* for William Kynaston [*611] Mott, the great-grandson of William Mott, the testator, contended that the mines were not demised but sold to Fereday and Wilkinson, for ninety-nine years; and that the sum made payable to Hill, by the deed of July, 1807, was to be considered not as rent, but as purchase money; and that the four last instalments of it constituted part of William Mott's residuary personal estate, and were subject to the trusts thereof declared by his will.

Mr. *Chandless* appeared for T. C. Fell, one of the trustees of W. Mott's will.

THE VICE-CHANCELLOR:—It seems to me that the parties themselves have made the strongest possible distinction between rent and instalments: for, towards the end of the deed, Hill and Rothwell, in consideration of the premises, covenant, for themselves and their respective heirs, executors and administrators, with Fereday and Wilkinson, their executors, administrators and assigns, that it shall be lawful for Fereday and Wilkinson, their executors, administrators and assigns, upon the 25th of March, 1808, to enter into and upon the buildings and lands as tenant or tenants of the

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same buildings, and of the surface of the same lands, and take the rents, issues and profits thereof for the term of ninety-nine years from thenceforth, under the rent thereafter mentioned, without the let, suit, trouble or interruption of Hill and Rothwell, their or either of their heirs or assigns, or any person or persons claiming or to claim by, from, through or under them, or any or either of them. That shows that the meaning of the parties was to draw a distinction between rent and a gross sum of money to be paid by instalments. Besides, in that part [*612] of the deed which *relates to the mines, there is no reservation at all of rent; it is not even said that the instalments are to issue out of the land. And, if the parties have not chosen to reserve any rent, I cannot say that rent is reserved so as to be necessarily incident to the reversion. It being then my opinion that no rent has arisen, I am not called upon to decide any question raised, on the subsequent instruments, with respect to rent.

The deed of July, 1807, is a most inartificial instrument, and full of blunders from the beginning to the end. If the parties had merely agreed to execute such a deed, and the Court of Chancery had been called upon to carry the agreement into effect, it would not have reserved any rent so far as the mines are concerned. My notion is that the true effect of the deed is to make the instalments nothing more than personal debts due from the grantees to the grantors.(a)

(a) The Vice-Chancellor said, in the course of the argument, that the question in the suit was purely a legal one, and that, if the parties desired it, he would send a case for the opinion of a court of law. The counsel replied that their clients would be satisfied with his Honor's decision.

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[*618]

Will.—Construction.—“Nearest of Kin.”

1843: 6th and 17th December. 1844: 20th February.

Testator directed one-half of the interest of his residue to be paid to his daughter and only child, and the other half to his wife, during their joint lives; and that, if his daughter survived her mother, or married and left issue, then that the whole of the capital should be paid to her, after his wife's death; but if she died first, without marrying or leaving issue, then that the trustees *should accumulate the interest* of the residue so far as it was not directed to be paid to his wife; and that, *on her death*, one-half of the capital should be divided amongst *his nearest of kin*, and the other half amongst his wife's nearest of kin. The daughter was the testator's nearest of kin at his death. She died a spinster, before her mother. At the mother's death the testator's sister was his nearest of kin.[1]

Held, that by “my nearest of kin,” the testator meant his nearest of kin *at his own death*, and not at the death of his wife; and, consequently, that the personal representative of his daughter, and not his sister, was entitled to one moiety of the residue.

Pleading.—Parties.—Next of Kin.

If, in an administration suit instituted by the next of kin of a testator at his death, the question is whether the testator, by the words “my next of kin,” meant his next of kin at his death or at a future period, not only the executor, but also the person or persons who may, by possibility, be the next of kin at that period, ought to be made defendants

MURDOCK URQUHART, by his will dated the 24th of December, 1827, gave all his estate, property and effects, both real and personal, to T. Leggett and Robert Hutchinson, and then expressed himself as follows:—

“I hereby declare my will to be, in the first place, that my said trustees and executors shall, as soon after my decease as may be convenient, sell and dispose of the lease of my house in Pulteney street, stock in trade and the good will of the business carried on by me, and shall collect the outstanding debts of every description due to me, and convert the whole property and effects **into money*; and, after paying all my just [*614] debts, funeral charges and expenses, shall invest the free residue of my said means and estates in government security or

[1] See *Gundry v. Pinniger*, 1 De G. McEl. & Gard. 502.

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otherwise as they shall judge most proper, to be applied as after mentioned: Secondly, I hereby appoint my said trustees to pay my wife, Mrs. Mary Giles or Urquhart, after my decease, during her lifetime and remaining my widow, and so long as our only child and daughter, Mary Amelia Urquhart, still remaining unmarried and lives in family with her mother, the interest arising from the said free residue or capital: Thirdly, in the event of the said Mary Amelia Urquhart marrying during her mother's life and widowhood, the sum or annuity to be paid to my said wife, shall be restricted to the interest of one half of the said capital or free residue, and my said trustees shall pay the interest of my remaining half, to my said daughter; or, if it shall appear to them more advisable and for her advantage, they are hereby empowered, at her marriage, to pay the half of the said capital itself, or such part thereof as they should think proper: Fourthly, in the event of my said wife entering into a second marriage, then that the sum or annuity to be paid to her by my said trustees, shall be restricted to the interest of one third part of the said free residue, the remaining two-thirds, or the interest thereof, to be paid to my said daughter or her lawful issue; or, in case of her dying without issue, that the trustees should continue to hold the remainder of the said capital: Fifthly, in the event of my said daughter surviving her mother, or being married and leaving issue, then, on the decease of my said wife, that the whole residue or capital, or the interest thereof, as the trustees shall think fit, shall be paid to or be applied for the behoof of my said daughter or her issue: Sixthly, in the event of my said daughter

[*615] predeceasing my said *wife without marrying or leaving issue, then, *during the life of my said wife, my said trustees shall accumulate the interest of the said capital or residue so far as not directed to be paid to her; and, on the decease of my said wife, the whole residue or capital shall be divided into two equal parts or shares, one of which shall belong to and be divided amongst the nearest of kin of me, the said Murdock Urquhart, and the other half of the said capital shall be divided amongst the nearest of kin of my said wife, who shall have power to apportion the division of the said half as she shall think proper, by any writing to be executed by her during her lifetime: Lastly, it is*

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my will that my said wife, during her life and remaining my widow, shall enjoy the use of the whole household furniture, plate, bed and table linen in my said house, and that, on her death or second marriage, the same shall be delivered to my said daughter."

The testator died on the 24th of December, 1827, leaving his wife and daughter surviving. The daughter died in January, 1829, intestate and without having been married; and letters of administration of her estate were granted to her mother.

In February, 1829, Mrs. Urquhart filed a bill in this court against Leggett, (who was the only acting executor and trustee of her husband's will,) stating that she was advised that, according to the true construction of the will, that moiety of the clear residue of the testator's estate, the interest whereof was given to Mary Amelia Urquhart during the life of Mrs. Urquhart, vested in Mary Amelia Urquhart absolutely, as the only next of kin of the testator *living at the time of his decease*, and that the same then belonged to Mrs. Urquhart, as the legal personal representative of Mary *Amelia Urquhart, and that she was [*616] entitled to receive the same, with the accumulations thereon since the death of Mary Amelia Urquhart, notwithstanding the direction contained in the will for accumulating the interest thereof during the life of Mrs. Urquhart: and the bill prayed for a declaration to that effect; and that it might be also declared that Mrs. Urquhart was entitled to the interest of the other moiety of the residue, during her life or widowhood.

The cause of *Urquhart v. Leggett* was heard in April, 1830, and the court then declared that, according to the true construction of the will, Mrs. Urquhart, in the events which had happened, was entitled to one moiety of the clear residue of the testator's personal estate, as the legal personal representative of Mary Amelia Urquhart, the daughter and only child of the testator; and ordered that such moiety should be transferred and paid to her by Leggett; and the court also declared that Mrs. Urquhart was entitled, during her widowhood, to the interest

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and dividends which should accrue in respect of the remaining moiety of the testator's estate.

Mrs. Urquhart caused the decree to be enrolled shortly after it was pronounced, and died in February, 1841, having appointed William Urquhart, one of the defendants, her executor.

Leggett died in November, 1836, having appointed the defendant Runcy his executor. Hutchinson survived him, but refused to prove the testator's will; whereupon administration *de bonis non*, to the testator, was granted to the defendant Hannah Bailey.

The bill in *Urquhart v. Urquhart* was filed by the testator's sister, and, after stating as above, alleged *that, upon the death of Mary Urquhart, the residuary estate of the testator became divisible, in equal moieties, between the nearest of kin of the testator and the nearest of kin of Mary Urquhart, according to the directions contained in his will; and that the plaintiff was advised and charged that, according to the true construction of the will, Mary Amelia Urquhart did not acquire a vested interest in any part of the testator's residuary estate; for that the moiety of the residue, the interest whereof was given to her during the life of her mother, did not vest in her by reason of the interest thereof being given for her support and maintenance, or by reason of any other expression in the will; and, further, that it did not vest in her as the next of kin of the testator *living at the time of his death*, as the defendants alleged, but that, on her death, it ought to have been set apart and invested, and the interest thereof accumulated during the life of Mary Urquhart; and that such moiety, with the accumulations thereof, ought, on the death of Mary Urquhart, to have been added to the moiety of which she received the interest during her life, so as to form one aggregate residuary fund, and that one-half of such aggregate fund ought then to have been paid to the plaintiff, as the sister and sole next of kin of the testator *living at the time of the death of his widow*, for her own absolute use and benefit: and that the plaintiff was advised that the de-

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cree in *Urquhart v. Leggett* was erroneous, for the reasons before mentioned, and that the same ought to be reversed: and that the plaintiff was further advised that, inasmuch as she *was not made a party to that suit*, she was not bound by the decree, and that she could not obtain the relief to which she was entitled by appealing from it, nor except by exhibiting her bill for relief in this court.

*The bill then prayed that the decree might be de- [*618] clared erroneous and might be reversed: and that it might be declared that Mary Amelia Urquhart did not take a vested interest in a moiety of the residue of the testator's estate, either by virtue of the third clause in his will, or as his next of kin living at the time of *his death*; but that the said moiety ought, after her death, to have been accumulated during the lifetime of Mary Urquhart, upon the trusts declared in the will; and that the plaintiff might be declared to be entitled to one moiety thereof, and also to one moiety of the other moiety of the testator's residuary estate, as the sole nearest of kin of the testator *living at the time of the death of his widow*: or, if the court should be of opinion that Mary Amelia Urquhart took a vested interest in one moiety of the testator's residuary estate, by virtue of the third clause, or any expression in his will other than the bequest to his nearest of kin, then that it might be declared that the plaintiff was entitled to one moiety of the other moiety, as the only nearest of kin of the testator living at the time of the death of his widow, and that the same might be decreed to be paid to her.

Mr. *Stuart* and Mr. *Dick*, for the plaintiff, said that it was manifest, from the context of the will, that the testator, by the words: "the nearest of kin of me, the said Murdock Urquhart," did not mean his nearest of kin at his own death, but his nearest of kin at the death of his wife: for, first, he had previously provided for his daughter (who was his nearest of kin at his death) and for her issue: secondly, he had directed that, in the event of her dying in the lifetime of his wife, without marrying or leaving issue, the interest of *her moiety should [*619] be accumulated during the life of his wife; which was

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a most important circumstance to show that, by the words on which the question arose, he did not mean his nearest of kin at his own death; and, thirdly, he had directed that, *on the decease of his wife*, the whole of the residue should be divided into two equal parts, and that one of those parts should belong to and *be divided amongst* his nearest of kin (an expression applicable to a plurality of persons, and not to a singular individual) and the nearest of kin of his wife: that, as the testator had said that, on the happening of a certain event, his residuary estate should be divided amongst persons answering a particular description, he must have meant those persons who should answer that description when the event happened: that the nearest of kin of his wife, who were to take one moiety, must be ascertained at her death; and his own nearest of kin, who were to take the other moiety, must be ascertained at the same time; and, consequently, the plaintiff, who was his nearest of kin at his wife's death, was entitled to a moiety of the residue. *Holloway v. Holloway*,(a) *Jones v. Colbeck*,(b) *Bird v. Wood*,(c) *Briden v. Hewlett*,(d) *Butler v. Bushnell*,(e) *Elmsley v. Young*.(g)

Mr. *Bethell* and Mr. *Shapter*, for Hannah Bailey, the personal representative of the testator, said that the bill sought to set aside the decree in *Urquhart v. Leggett*, and, therefore, it was, in fact, a bill of review; and, as it had been filed without the leave of the court, it ought to be dismissed with costs: that the suit in which that decree was made, was properly constituted with respect *to parties; for *Leggett*, the executor of the testator, represented every person who might, by possibility, claim the residue; and, therefore, the plaintiff, though not a party to that suit, was bound by the decree; and, if any of the next kin had filed a bill against *Leggett*, he might have pleaded that decree.

The VICE-CHANCELLOR:—At the death of the testator, his sister might, by possibility, be clothed with the character of his

(a) 5 Ves. 399.

(b) 8 Ves. 38.

(c) 2 Sim. & Stu. 400.

(d) 3 Myl. & Keen. 90.

(e) 3 Myl. & Keen, 232.

(g) 2 Myl. & Keen, 82.

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next of kin at the death of his widow; and, on account of that possibility, I think that she ought to have been made a party to the suit instituted by the widow. If the widow had been out of the jurisdiction, and the sister had been aware that the executor was wasting the assets, might she not have filed a bill against him?

Mr. *Bethell*.:—If a bequest is made to an individual answering a particular description, and there is a person who answers that description, he is entitled to have his right decided in a suit brought by him against the executor alone; for the executor represents all persons whose interests have not come into *esse*.

Mr. *Willcock*, for William Urquhart, the executor of the testator's widow, relied on the decree in *Urquhart v. Leggett* as being conclusive against the claim of the plaintiff; and added that there was no evidence of any fraud or concealment having been practiced, by Mrs. Urquhart, in that suit, or of any collusion between her and Leggett: that the general rule was that a gift to the next of kin of a testator, meant his next of kin at his death; and that the cases cited for the plaintiff, were exceptions to that rule: he cited *Clapton v. Bulmer*,^(g) and 2 Jarman on Wills, page 52.

*Mr. *Anderson* appeared for Runcy, the personal representative of Leggett. [*621]

The VICE-CHANCELLOR:—I shall take time to consider this case.

The VICE-CHANCELLOR:—The question in this case, substantially, is, what is the true construction of the will of the testator.

It is apparent, on the face of the instrument, that the testator, himself, was a Scotch gentleman; and the attestation of it, states

(a) *Ansé*, Vol. X, p. 426.

that it was prepared by a practitioner in the supreme courts of Scotland. I mention that, because the language of the will is so inaccurate that one cannot but think that the person who prepared it, did not exactly understand the meaning of the terms he used.

The will begins in this manner: The testator, in very copious language, gives all his property to certain persons named. The terms which he uses are as follows: "All my estate, property and effects, both real and personal, of every description, where-soever situated, belonging to me, and, particularly, the stock in trade, goods, debts and effects, and sums of money presently belonging, or that shall belong and be vesting or owing to me at my decease, whether by contract, bonds, bill, open account or otherwise; as also the lease of the house presently occupied by me in Pulteney street: and I hereby nominate and appoint the said T. Leggett and R. Hutchinson, or the survivor of them, to be my sole executors or executor, and that for the purpose [*622] poses following, *namely: In the first place, it is my will that my said trustees and executors, as soon after my decease as may be convenient, shall sell and dispose of the lease of my house in Pulteney street, the stock in trade, and the good will of the business carried on by me; and shall collect the outstanding debts of every description due to me, and convert the whole property and effects into money." Now, it is perfectly apparent on the face of the will, that that direction to convert the whole property and effects, does not mean the whole property and effects; because, after a very laborious set of sentences which affect to dispose of the residue, the last is this; "Lastly, it is my will that my said wife, during her life and remaining my widow, shall enjoy the use of the whole household furniture, plate, bed and table linen in my said house, and that, on her death or second marriage, the same shall be delivered to my said daughter." One would have thought that he took it for granted, when he used the expression: "delivered to my said daughter," that his daughter would survive his wife: but, when you come to look at the clauses which precede, you will see that he has, in the most laborious manner, provided for the contin-

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gency, not only of his daughter surviving his wife, but of the daughter dying in her lifetime. I mention this for the purpose only of showing the inaccuracy of the language, and not because the expression creates a doubt; because no one has contended that by the words: "shall be delivered to my said daughter," the daughter lost the right to have the furniture, &c., after her mother's death, merely because she died in her mother's lifetime.

Then the facts appear to be that the testator, at the time of his death, had a sister who is now the plaintiff. His wife survived him, and his daughter attained *twenty-one [*623] on the 31st of March, 1826; and on the 10th of January, 1829, she died intestate and unmarried, and her mother administered to her. After her death, a bill was filed by the mother, against the acting executor; and, upon that the decree was made, which, in effect, decided that the mother, in her own right and as the administratrix of her daughter, was entitled to the whole of the property, except one moiety of the capital and the furniture, &c., about which no question was raised.

That took place nearly fourteen years ago. In February, 1841, the mother died; and, since her death, a bill has been filed by the testator's sister, which, in some parts of it, is not, perhaps, quite in the form in which it ought to have been; for it led me at first to imagine that it was a bill of review to have the decree reversed and so on. But that goes for nothing; because, whatever took place in the former suit, took place in the absence of the party who is the plaintiff in the present suit; and, therefore, would not bind her. Consequently, I conceive, notwithstanding some of the expressions in the present bill, that it is quite open to the present plaintiff, to have the question, what is the true construction of the will, reconsidered and determined.

The will is certainly a most singular one. The bill does not set forth the whole of it: but, whenever I am required to construe such an instrument, I read through the whole of it, in order to be more certain of ascertaining the meaning.

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The will, after directing the conversion, directs that

[*624] the executors: "after paying all my just debts, *funeral charges and expenses, shall invest the free residue of my said means and estate in government securities or otherwise, as they shall judge most proper, to be applied as after mentioned: Secondly, I hereby appoint my trustees to pay to my wife, Mrs. Mary Giles or Urquhart, after my decease, during her lifetime and remaining my widow, and so long as our only child and daughter, Mary Amelia Urquhart, shall remain unmarried and live in family with her mother, the interest arising from the said free residue or capital." I mark that, because I find that this very same thing is seven times mentioned; and I think that six times the descriptions are different. I mark it for the purpose of showing the extreme inaccuracy of the language used by the gentleman who framed the will. First, it is called free residue:" next it is called, "free residue or capital." Now this is the case in which the whole income is directed to be paid to the wife in the event (as it appears afterwards) of her remaining unmarried, and the daughter not being married and living in family with her. "Thirdly, in the event of the said Mary Amelia Urquhart marrying during her mother's life and widowhood, the sum or annuity to be paid to my said wife, shall be restricted to the interest of one-half of the said capital or free residue." But that event has never happened: "and my said trustees shall pay the interest of the remaining half to my said daughter; or, if it shall appear to them more advisable and for her advantage, they are empowered, at her marriage, to pay her the half of the said capital itself, or such part thereof as they shall think proper." Neither did that event happen. "Fourthly, in the event of my said wife entering into a second marriage, then the sum or annuity to be paid to her by my said trustees, shall be restricted to one-third of the said free residue;"—there the expres-

[*625] sion *is again changed—"the remaining two-thirds, or the interest thereof, to be paid to my said daughter or her lawful issue; or, in case of her dying without issue, the trustees shall continue to hold the remainder of the said capital: Fifthly, in the event of my said daughter surviving her mother,

or being married and leaving issue,"—neither of which events happened—"then, on the decease of my said wife, the whole residue or capital, or the interest thereof, as the trustees shall think fit, shall be paid to or applied for the behoof of my said daughter or her issue." Then he provides for an event which did happen. "Sixthly, in the event of my said daughter predeceasing my said wife without marrying or leaving issue, then, during the life of my said wife, my said trustees shall accumulate the interest of the said capital or residue, so far as not directed to be paid to her." Now, just consider the true meaning of these words as they stand. He is speaking of the event of his daughter being dead; and it seems to me that, in the event of the daughter being dead, there is no direction whatever that anything shall be paid to the mother. The direction to pay to the mother, has been provided for by the clauses which I have mentioned. But the first clause, where the direction is that the whole shall be paid to the mother, contemplates the case where the daughter is living in family with the mother; and the subsequent clauses are not clauses which provide that anything shall be paid to the mother in the event of the daughter being dead.

Then the sixth clause proceeds thus: "and, on the decease of my said wife, the whole residue or capital shall be divided into two equal parts or shares, one of which shall belong to and be divided amongst the nearest of kin of me, the said Murdock Urquhart, and *the other half of the said capital shall [*626] be divided amongst the nearest of kin of my said wife, who shall have power to apportion the division of the said half as she may think proper, by any writing to be executed by her during her lifetime." It seems to me, upon the words as they stand, that if it be taken that there is a direction to accumulate, and nothing is given to the wife, the direction to accumulate would extend to the whole of the interest: but, in the bequest which is to take effect on the death of the wife, there are no words which comprehend the accumulated fund. The only words that are used are these; "and, on the decease of my said wife, the whole residue or capital shall be divided into two equal

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parts or shares;" and he has, before, in the different sentences where he speaks of residue, free residue and capital, or residue or capital and so on, shown that he was speaking of the original *corpus* of the fund, produced by the sale and conversion, which would remain after payment of his debts and funeral charges and expenses; and the consequence is, that the wife would be left penniless in the event of the daughter dying in her lifetime. That, however, could hardly have been intended by the testator; although the words which he has used in this sixth clause, would, if they were literally and strictly construed, lead to that result.

Then, with respect to the capital as separate from the accumulations, it is contended, on the part of the plaintiff, that the words: "shall belong to and be divided amongst the nearest of kin, of me, the said Murdock Urquhart," mean those nearest of kin of the testator who should be living at the death of his wife.

But the words, of themselves, do not express that: they [*627] express the nearest of kin of the testator, simply; *and would comprehend the daughter if she were living at his death, or any subsequently born children that he might happen to have living at the time of his death.

In support of the claim made by the plaintiff, reference has been made to *Jones v. Colbeck* before Sir W. Grant, and also to *Bird v. Wood*, and the two other cases of *Briden v. Hewlett*, and *Butler v. Bushnell*, before Sir John Leach.

With respect to the case of *Jones v. Colbeck*, it seems to me to be directly at variance with the decision, by Lord Alvanley, in *Holloway v. Holloway*.

With respect to the case of *Bird v. Wood*, which was decided by Sir J. Leach, my opinion is that, having regard to that case as it is stated in the report, the decision was perfectly right; although as he says when he speaks of that case in *Elmsley v. Young*, the judgment is too shortly reported.(a) Sir John Leach

(a) See *ante*, Vol. XII, p. 321, note (k).

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says, in *Bird v. Wood*: "The persons who, at the testatrix's death, would have been her next of kin if her daughter had been then dead without children, are plainly intended here." That was not so; because the language of the will was: "to be considered as a vested interest from the time of the testatrix's death, except as to any child who might afterwards be born of her daughter." So that the exception shows what was the class of persons out of whom the exception was made; and the exception was: "any child that might be afterwards born of her daughter;" and, therefore, it was quite plain that the next of kin at the death of the daughter, were the persons entitled.

*The cases of *Briden v. Hewlett* and *Buller v. Bushnell*, [*628] also were, as I think, rightly decided; because the futurity or contingency of character in the persons designated by the general words, was sufficiently pointed out by the expression: "would be," in the one case, and: "should happen to be," in the other.

It seems to me that the point which was decided in *Holloway v. Holloway*, was rightly decided according to the decisions of Sir John Leach, himself, on the first of the two points in *Elmsley v. Young*; in which case, the provision having been made so as to give Alexander Elmsley a life estate in the fund, the ultimate words were: "to such person or persons as should, at the time of the decease of Peter Elmsley, be the next of kin of him the said Peter Elmsley." A question was raised whether Alexander was excluded or included; and it was held that he was included. And Sir John Leach, in giving judgment in that case, uses this language: "In cases of this nature, the inquiry necessarily is whether the next of kin who are to take upon the failure of a particular gift to one for life with remainder over, are the next of kin of the testator or settler living at his death, or the next of kin of the testator or settler living at the death of the tenant of the particular estate. If the persons who are to answer that description, are to be the next of kin at the death of the testator or settler, and the tenant of the particular estate be then living and be himself one of the next of kin at that period, he cannot

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be excluded from the benefit which is annexed to that character. If the next of kin who are to take upon failure of the gift to the particular legatee or donee, are meant to be the next of kin living at the death of the legatee or donee, it is plain that [*629] such legatee or *donee could not be intended to be included under that description." That is perfectly true: if, by the terms in which the description is couched, the persons who are to answer the description are to be the next of kin at the death of the testator or settler, those very next of kin must take: and so with respect to the second proposition.

But what, I apprehend, is really the rule, is that the persons who are designated by any description, must be the persons who answer that description according to the legal sense of those words, unless, on the face of the instrument, you find that the testator himself has put a construction on those words, and shown that he does not mean them to be used in their natural, ordinary and legal sense. That I apprehend to be the rule; and I find, in this case, nothing whatever to control or confine the effect of the words: "the nearest of kin of me," except the mere surmise which arises from the circumstance that the testator had, before, in some sort or other, made a bequest to his daughter. That is the only circumstance; and my opinion is that, upon this will, there is not enough to show that, by the terms: "the nearest of kin of me," the testator did not mean those who should be his nearest of kin at the time of his death.

Considering the obvious inaccuracy in the language of this will from the beginning to the end of it, it seems to be quite impossible to construe it safely, unless you adhere to the literal meaning of the words in every case where the testator has not himself put a construction on those very words. I pointed out that, in the very first clause, he gives a general direction [*630] for the conversion *into money of all his effects; but, when you come to the latter part of the will, you find that the testator intended to put a restriction on that general direction, and that he did not mean *all* his effects to be converted. But I find nothing whatever which authorizes me to put a

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restricted or limited construction on the words which describe the nearest of his kin; and, therefore, my opinion is that the present plaintiff is not entitled to any portion of the residue.

With respect to the accumulations arising from the interest of that moiety of the residue which the plaintiff claims, I observe that the will is silent as to them; and, therefore, the daughter was entitled to two-thirds of them, and the widow was entitled to the other third, under the Statute of Distributions; and she became entitled to the other two-thirds as representing her daughter; so that eventually she was entitled to the whole; as the decree in *Urquhart v. Leggett*, declares.

*ZULUETA v. ARDOUIN.

[*631]

Practice.—Exceptions.

1843: 14th December.

An order for setting down exceptions to a report of insufficiency in an answer, if served after, though on the same day as an order to amend, and for defendant to answer the amendments and exceptions together, is irregular.

EXCEPTIONS to the answer for insufficiency having been allowed, the plaintiff obtained an order to amend and for the defendant to answer the amendments and exceptions at the same time. The defendant then excepted to the master's report, and obtained an order for setting down the exceptions for argument. After that order had been obtained, the plaintiff served his order; and afterwards, but on the same day, the defendant's order was served.

Mr. Wakefield, Mr. Bethell and Mr. Rogers for the plaintiff, now moved that the exceptions to the report might be taken off the file, and that the order for setting them down, might be discharged for irregularity. They cited *Farquharson v. Balfour*.(a)

(a) Jacob's Rep. 587.

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Mr. *Stuart* and Mr. *Giffard* for the defendant, contended that the order for setting down the exceptions, took effect from the earliest hour of the day on which it was served; and cited *Whitehouse v. Hickman*,^(a) and *Ibbotson v. Booth*.^(b)

THE VICE-CHANCELLOR:—This case is precisely like *Farquharson v. Balfour*.

The practice of the court sometimes allows a race to be [*632] run, in which the quickest always wins. As the *defendant did not serve his order for setting down the exceptions before the plaintiff had served his order, the exceptions go for nothing. The maxim: "*qui prior est in tempore, potior est in jure*," applies.^(c)

Motion granted.

(a) 1 Sim. & Stu. 102.

(c) See 1 Phillips' Rep. 368.

(b) Ibid. p. 103, note.

EDWARDS AND WIFE v. JONES AND WIFE.^(a)

Affidavit.—Practice.—Motion.

1843: 13th December. 1844: 2d May.

The plaintiff's title to the relief prayed depended upon A. (whose administrator he was,) having survived B. The answer stated that the defendant did not know and could not set forth, whether A. did survive B. or whether A. was living or dead. The plaintiff, in support of a motion for a receiver and for payment into court of money in the defendant's hands, produced an affidavit to prove that A. died after B., and to prove also a letter alleged to have been written by the defendant to the plaintiff's solicitor, and to contain an admission of the fact. The answer denied that the defendant wrote the letter, but added that it might have been written by some person in the habit of being about him: Held, that the affidavit was not admissible.

Practice.—Production of Documents.—Motion.

A defendant, in his answer, admitted the possession of documents relating to the matters in the bill, except the question whether A. survived B., which was the

(a) 1 Ph. 501

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question upon which the plaintiff's title depended: Held, that he was not entitled to have the documents produced.

THE plaintiff Margaret Edwards and the defendant Ellen Jones, were, respectively, the personal representatives of Howell Powell and John Owen. The bill alleged that Owen died, intestate, in 1835, leaving Howell Powell, his nephew, and the defendant Ellen Jones, his niece, his sole next of kin: that, at Owen's death, Powell was residing at New York in America, in consequence of which letters of administration to Owen's estate were granted to Ellen Jones: that Powell died on the 12th of December, 1839, and that Margaret *Edwards, as his [*633] personal representative, was entitled to a moiety of Owen's residuary personal estate.

The defendants Pierce Jones and Ellen his wife, in their answer, said that Owen left Mrs. Jones his next of kin him surviving, and that he did not leave any other next of kin: "*unless his nephew Howell Powell was living at the time of his decease: but whether or not the said John Owen did leave the said Howell Powell one of his next of kin him surviving, these defendants do not know and cannot set forth as to their belief or otherwise, inasmuch as they do not know and cannot set forth, as to their belief or otherwise, whether or not the said H. Powell was living at the time of the death of the said John Owen, or whether or not he is now living; but if the said H. Powell was then living, this defendant Ellen Jones and the said H. Powell were the only next of kin of the said John Owen at the time of his decease; and, if the said H. Powell is now living, this defendant Ellen Jones and the said H. Powell are now the only next of kin of the said John Owen.*" The defendants further said that they were unable to set forth whether letters of administration to H. Powell's estate had been granted to Mrs. Edwards; and that they had, in their possession, the documents mentioned in the third schedule to their answer, which they prayed might be taken as part thereof; and they admitted that those documents related to the matters in the bill, *except the question of H. Powell's death.*

The plaintiffs then amended their bill by inserting in it a let-

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ter of the 27th of August, 1841, written by their solicitor, Mr. Roberts, to the defendants, and applying for an account of Owen's estate: and the amended bill charged that, in answer [*634] to that letter, the defendant, *Pierce Jones, wrote a letter to Mr. Roberts, dated the 31st of August, 1841, which commenced thus: "This is to inform you that I had a letter, on the same subject, about two years before Howell Powell's death, by his son-in-law."

The defendants, in their answer to the amended bill, said that they were of very advanced age; that neither of them had any recollection of having received the alleged or any other letter, from Roberts; and that, at the time when that letter was stated to have been answered, P. Jones was nearly blind: and he and his wife denied, according to the best of their recollection and belief, that P. Jones ever wrote such a letter as in the bill stated, or any other letter, to Roberts. They said, however, that such a letter might have been written and sent by some person who was in the habit of being about them: but they denied that, either at the date of that letter or at any other time, they knew or had any reason to believe or suspect that Powell survived Owen and was then dead, or that they had ever received any such letter as was referred to in their alleged answer to Roberts. They added that the documents admitted, by their answer to the original bill, to be in their possession, related, but that no other documents in their possession, related to Owen's estate; and that such documents did, in the manner appearing in the original and amended bill, and in their answer to the original bill and the schedules thereto, and in their answer to the amended bill, exclusively relate to or evidence their title; unless the plaintiffs should prove that Powell survived Owen, and that Mrs. Edwards was his personal representative; and that, unless the plaintiffs should prove those facts, the documents in their possession, [*635] would not relate to property or matters *to which the plaintiffs and defendants had a common title.

A motion was now made, on behalf of the plaintiffs, for payment, into court, of a sum of money belonging to Owen's estate

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and admitted by the defendants to be in their hands; for the production of the documents mentioned in the schedule, and for a receiver of Owen's estate.

Mr. *Bethell* and Mr. *Renshaw* in support of the motion, produced an affidavit made by the plaintiff G. Edwards and by Roberts and his clerk, in which Edwards verified the signature of the clerk to a hospital at New York, to a certificate that Powell died, in the hospital, on the 12th of December, 1839; and in which Roberts and his clerk proved the writing and sending of the letter of the 27th of August, 1841, and the receipt of the answer, and that it was in Pierce Jones' handwriting.

Mr. *Stuart* and Mr. *Craig* for the defendants, objected to the affidavit being read, on the ground that the object of it was to prove a *fact*, namely, the death of Powell, which was neither admitted nor denied by the answer. They cited *Castellain v. Blumenthal*,^(a) and *Dubless v. Flint*,^(b)

Mr. *Bethell* and Mr. *Renshaw*, in answer to the objection, said that *Castellain v. Blumenthal* decided nothing more than that, if a plaintiff was showing cause against dissolving the common injunction on merits confessed in the answer, he must find the merits in the answer; that *Lord Langdale, however, [*636] had expressed an opinion, in *Ord v. White*,^(c) that, even in that case, affidavits were admissible to prove allegations in the bill which the answer neither admitted nor denied: and they cited *Morgan v. Goode*,^(d) *Farrer v. Hutchinson*,^(e) *Jefferys v. Smith*,^(g) *Addis v. Campbell*,^(h) *Barrett v. Tickell*.⁽ⁱ⁾

The VICE-CHANCELLOR decided that the affidavit was not admissible to prove the death of H. Powell.

May 2d.—The motion was not mentioned again until this day, when

(a) *Ante*, Vol. XII, p. 47.

(b) 4 Myl. & Cr. 502.

(c) 3 Beav. 357.

(d) 8 Mer. 610.

(e) 3 Youn. & Coll. 692.

(g) 1 Jac. & Walk. 298.

(h) 1 Beav. 258.

(i) Jac. Rep. 159.

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Mr. *Bethell* and Mr. *Renshaw* proposed to read the affidavit to prove Roberts' letter to the defendants and the answer to it; the latter of which, they said, contained a statement which went very far to prove that Powell survived Owen. They added that a plaintiff was always at liberty to prove, by affidavit, documents which the answer neither denied nor admitted; and that, under the 43d general order of August, 1841, exhibits might be proved, by affidavit, even at the hearing of a cause.—[THE VICE-CHANCELLOR:—The question is whether the 43d order authorizes a document to be proved by affidavit, in any stage of a cause except the hearing.]—Neither the answer to Roberts' letter, nor the fact which it tends to prove, is positively denied by the answer: and the defendants admit that it may have been [*637] written by some person in the habit of being *about them; therefore it may have been written by some person, by their authority. *Jefferys v. Smith*, *Ord v. White*, *Barrett v. Tickell*, and *Hodgson v. Dean*.^(a)

THE VICE-CHANCELLOR:—I entertain a very clear opinion upon the present question: and, if the discussion had terminated when the motion was first brought before me, I should have expressed the same opinion upon it as I now do, and that is, that I am not authorized, by the practice of the court, to admit the affidavit.

The bill is filed by persons claiming under Howell Powell, whom they represent to have been one of the two next of kin of John Owen, the intestate in the cause, and to have been entitled, as such, to a moiety of the intestate's residuary personal estate. To that bill an answer is put in, in which the title of the plaintiffs is not admitted, or, at the utmost, is admitted hypothetically only, that is, provided the allegations in the bill with respect to the title of the plaintiffs, are true. Then the plaintiffs amend their bill, and an answer is put in to the amended bill, which leaves it uncertain whether a particular letter was ever written or not, and, if it was written, whether it was written under such circumstances as to make it binding on the defend-

(a) 2 Sim. & Stu. 221.

 1843 and 1844.—*Edwards v. Jones.*

ants: for, in my opinion, the statement that it might have been written by some person in the habit of being about the defendants, does not amount to an admission that it was written by some person authorized by the defendants. And my notion is that, on an interlocutory application like the present, where the subject of the application is *not an injunction [*688] to restrain waste, the plaintiff cannot make his title better than he finds it on the answer.

I am, therefore, of opinion that the affidavit cannot be admitted in support of the motion, so far as it asks either for payment into court, of the sum admitted by the defendants to be in their hands, or for the appointment of a receiver. But I will hear anything that can be said in support of that part of the motion which relates to the production of documents.

Mr. *Bethell* and Mr. *Renshaw* then said that, where a defendant submitted to answer, and admitted that he had documents in his possession relating to the matters contained in the bill, the documents were part of the discovery which he had submitted to give; and, consequently, the plaintiff was entitled to have them produced for his inspection: that, if the plaintiffs in this case had amended their bill and required the defendants to set forth the contents of the documents, word for word, the defendants could not have refused so to do. They cited *Hardman v. Ellames*,^(a) *Tyler v. Drayton*,^(b) *Smith v. The Duke of Beaufort*,^(c) and *Wigram on Discovery*, p. 210.

THE VICE-CHANCELLOR:—It is perfectly plain, in such a case as this, where a party sues as representing one of the next of kin of an intestate, and his title is not admitted by the defendant, that he is not entitled to a production of the documents which the defendant merely admits to be in his possession and to relate to the affairs of the intestate.

*This case is not at all like *Hardman v. Ellames*; for [*689]

(a) 2 Myl. & Keen, 732.

(c) 1 Hare, 507

(b) 2 Sim. & Stu. 309.

1843.—*Coham v. Coham*.

in that case, the defendant referred to the documents as substantiating the statements in his answer.

In the passage which Mr. *Bethell* read from Vice-Chancellor Wigram's work on discovery, the learned author seems to me to take it for granted that the party had a title: unless that is so, I cannot accede to the proposition there stated.(a)

Motion refused with costs.

(a) See 1 Phillips Rep. 501.

COHAM v. COHAM.

Infant.—Guardian.

1843: 22d December.

The court will refer it to the master, to approve of a guardian for an infant, notwithstanding the infant, being fourteen years of age and entitled to real estate, has, by deed, appointed a guardian for himself.

A PETITION presented in this cause, in the name of an infant, for a reference to the master to approve of a guardian, was opposed on the ground that the infant, who was fifteen years of age and tenant for life of real estate under his father's will, had, by deed, appointed a gentleman named Bassett, his maternal uncle, to be his guardian.

Mr. *Bethell* and Mr. *Nichols*, in support of the petition, said that an infant had no power to appoint his own guardian, unless he was seised of socage lands *by descent*. *Ex parte Walkins*;(b) *Quadrang v. Downs*;(c) *Curtis v. Rippon*.(d)

[*640] *Mr. *Follett* supported the petition on behalf of the infant's paternal relations.

Mr. *Stuart* and Mr. *Willcock*, for Mr. Bassett, said that, where

(b) 2 Vez. 470.

(d) 4 Madd. 462.

(c) 2 Mod. Rep. 177

 1844.—*St. Victor v. Devereux.*

an infant of the age of fourteen was entitled to real estate, he was entitled by law to nominate his guardian. Co. Litt. 78 b, and Hargrave's note (16), 88 b; and Chambers on Infancy, 516.

The VICE-CHANCELLOR said that no imputation was cast upon the character of Mr. Bassett, either by the petition or by the affidavits in support of it; but that it appeared that some animosity existed between the infant's relations on his father's side, and his relations on his mother's side, in consequence of which the petition had been presented; and that, as the parties could not agree among themselves, he considered it to be a matter of course to direct a reference, to the master, to approve of a guardian.

His Honor added that he had referred to the entry of *Curtis v. Rippen*, in Reg. Lib. A. 1819, fo. 222, from which it might be collected that the infant, in that case, was entitled to real estate; and he made an order according to the prayer of the petition.

**ST. VICTOR v. DEVEREUX.*(a)

[*641]

Practice.—Fund in Court.—Payment of Money into Court.

1844: 18th January and 8th February.

The court will not order money into court if the title of the party applying is at all doubtful. Neither will it order a fund standing to the credit of a cause between A. and B. to be transferred to the joint credit of that and another cause, in which it is claimed by C., adversely to both A. and B., unless C. has a perfectly clear title to the fund.

A FUND was standing in the name of the Accountant-General to the credit of a cause intituled: "*The Commissioners of Charitable Donations and Bequests in Ireland v. Devereux.*" The plaintiff in the present case, who was not a party to that cause, sought, by his bill, to establish an equity on the fund, adversely both to the plaintiffs and the defendants in that cause; and he

(a) *Ex relations.*

now moved, before any answer had been put in to his bill, that the fund might be transferred to the credit of both the causes.

Mr. *Cooper*, Mr. *Lee* and Mr. *Wilson*, for the motion, read affidavits in support of the claim which the plaintiff sought to establish by his bill, and said that the plaintiff was not asking that money which was in the pockets of defendants, might be paid into court; but that money, *which was already in court*, might be transferred from the credit of the cause in which it had been paid in, to the credit of that and another cause in which a separate and distinct claim was made to it; and which was so intricate that it could not be properly determined before the cause was heard; and, therefore, the court would protect the fund in the meantime.

Mr. *Wakefield*, Mr. *Bethell*, Mr. *Wilcock*, Mr. *Faber* and Mr. *Beavan* appeared to oppose the motion; but

The VICE-CHANCELLOR, without hearing them, said:—The question is whether it is the practice of this court, [*642] *before answer, before the title of the plaintiff is admitted, and where, as the counsel in support of the application have admitted, the question is too difficult to be decided on motion, to interfere and say that a fund in a given position, shall be displaced merely because a case has been brought forward which may or may not be decided in the applicant's favor.

The rule is that a party asking that money may be ordered into court, should have, not a doubtful, but a clear case. I have discussed the point with Lord Cottenham; and his Lordship agreed with me that applications of such a nature ought not to be granted, unless the party applying has a clear right.

In the case now before me, affidavits have been filed in support of the plaintiff's title, but no answer has been put in; and it has been admitted that the claim made by the plaintiff is too intricate to be decided on motion: and, under these circumstances, I am of opinion that the rule of the court must prevail:

 1844.—*Beresford v. The Archbishop of Armagh.*

and, therefore, without giving any opinion on the merits of the plaintiff's case, I refuse his motion with costs.(a)

(a) See *Richardson v. The Bank of England*, 4 Myl. & Cr. 165.

***BERESFORD v THE ARCHBISHOP OF ARMAGH. [*643]**

Husband and Wife.—Separate Property.—Acquiescence.

1844: 17th and 20th January.

A married lady became entitled to an estate for her separate use, under her grandfather's will; and she and her husband joined in appointing a person to receive the rents, as their agent; who, by the husband's direction, paid them to an account opened by him with H. & Co., the bankers of his wife's family; and he drew checks on H. & Co. for sums, some of which he applied for his own purposes, and the rest to keep down the interest of incumbrances on the estate. At the husband's death a large balance remained in the hands of H. & Co., which they transferred to the account of his executors; and his wife, who was his sole executrix, drew on H. & Co. in that character, and died about ten months after her husband: Held, that the balance belonged, not to her, but to her husband's estate.

UNDER the will of John Lord Delaval, the late Marchioness of Waterford, his granddaughter, was tenant for life, for her separate use, of an estate called the Fordcastle estate, in remainder expectant on the decease of Lady Delaval, her mother. During Lady Delaval's lifetime, the rents of the estate were received by a gentleman named Carr, as her agent; and, on her death, which took place in 1822, the Marquis and Marchioness of Waterford appointed the same gentleman to receive the rents as their agent. From that time until the marquis' death, Carr, by the direction of the marquis, paid the rents, not to Drummond & Co., who were his bankers, but to Hoare & Co., who were the bankers of the marchioness' family; and they placed the same to the credit of the marquis. The sums so paid during the marquis' lifetime, amounted in the whole to 30,000*l.*: and the marquis, at different times, drew checks on Hoare & Co. for sums amounting to 19,000*l.*, which he applied to keep down

 1844.—*Beresford v. The Archbishop of Armagh*.

the interest of incumbrances on the Fordcastle estate,^(a) [*644] to pay for the furniture at *Fordcastle which he purchased after Lady Delaval's death, and to discharge debts due from him to his physician, solicitor and other persons. The marquis died in July, 1826: and the marchioness was his sole acting executrix. After his death, Hoare & Co. transferred 11,000*l.*, the balance of the 30,000*l.* remaining in their hands, from the marquis' account to an account intituled: "The Executors of the late Marquis of Waterford:" but it did not appear whether they made that transfer of their own accord, or by the direction of the marchioness. The marchioness, however, as the executrix of the marquis, drew several checks on Hoare & Co., which were paid out of the balance, partly on account of the interest of the sums charged on the Fordcastle estate, and partly on account of the marquis' funeral expenses.

The marchioness died in June, 1827.

After her death the suit was instituted for the administration of the marquis' estate. One question in the cause was, whether the balance in the hands of Hoare & Co., at the death of the marquis, belonged to the marchioness, or formed part of the marquis' estate.

The decree at the hearing directed the master to inquire and state what was the annual amount of the rents of the Fordcastle estate from Lady Delaval's death until the death of the marquis, and when and by whom and by whose authority the same were received and paid, and what charges were payable thereout; and whether there was *any agreement or consent by the marchioness*, with any person and whom, as to the receipt, payment or application of the surplus rents; and the master was directed [*645] to state all the circumstances *as to the receipt, payment and application thereof.

(a) The marquis himself was entitled to the interest of 53,000*l.* and to an annuity of 429*l.*, part of the charges on the estate, out of which 1,000*l.* a year was payable to the marchioness under her marriage settlement.

The master reported that no *direct* evidence had been laid before him of any agreement having been entered into or of any consent having been given, by the marchioness, as to the receipt, payment or application of the surplus rents: but, as it appeared, from the evidence before him, that the marquis was permitted to deal with the cash standing to his account from time to time at Hoare's bank, as if the same belonged to him, without any interference by the marchioness or any person on her behalf; and as it further appeared that, after the marquis' death, the marchioness, as his executrix, treated the balance remaining at Hoare's to his account, as part of his personal estate, the master conceived it to be but reasonable to infer (particularly as there was no satisfactory evidence to the contrary) that the marchioness had privately agreed with or given her consent to the marquis, that the moneys arisen from the rents of the Fordcastle estate, which from time to time should be placed to his account with Hoare & Co., should be applied, by him, as if the same were his own proper moneys: and the master, therefore, found that there was an agreement or consent, by the marchioness with the marquis, that the surplus of the rents should be applied by him for his own use and benefit.

Lady Ingestrie, who was the marchioness' personal representative, excepted to the report, alleging that the master ought not to have inferred that the marchioness made such agreement or gave such consent as was mentioned in the report, but ought to have found that the surplus rents were part of the marchioness' estate.

The *Solicitor-General*, Mr. Lowndes and Mr. Elmsley, *in support of the exception, said that the property in [*646] question was not pin money, with respect to which acquiescence on the part of the wife, in the non-payment of it by her husband, was sufficient to discharge the husband; but the property in dispute was the wife's separate property, which she derived, not from her husband, but from her own relations; and, that being the case, mere acquiescence on her part, was not sufficient to entitle her husband to it, but there must be evidence of

1844.—*Beresford v. The Archbishop of Armagh.*

her having done some act amounting to a gift of it to her husband. *Pawlet v. Delaval*; (a) *Milnes v. Busk*; (b) *Smith v. Lord Camelford*; (c) *Powell v. Hankey*; (d) *Attorney-General v. Parnther*. (e)

In *Lord Digby v. Howard* (g) the property in dispute was not the separate property of the Duchess of Norfolk, but her pin money: your Honor, however, held that the estate of her husband was accountable for the arrears of it. It is true that the House of Lords reversed your Honor's decree; but the judgment of their Lordships turned entirely on the property being pin money and pin money only. (h)

The evidence in this case not only does not prove that any gift of the rents was made by the marchioness to the marquis, but it proves the contrary: for, if there had been any gift made of them, the marquis would have directed Carr to pay them, not to the bankers of his wife's family, but to Drummond & Co., who were his own bankers and on whom he invariably drew for his general purposes. The transfer of the balance, after [*647] *Lord Waterford's death, from his account to the account of his executors, was the act, not of Lady Waterford, but of Hoare & Co.: and the checks which she drew on them were for the purpose of paying the interest of the sums charged on the Fordcastle estate. If any of those checks were given to pay Lord Waterford's debts, Lady Waterford did not draw them until after she had exhausted the balance at Drummond's; and then, having no other fund to resort to, she had recourse to the balance at Hoare's. Surely, the fact of her having drawn on Hoare, under those circumstances, cannot be considered as evidence that she had given the rents to her husband. All that she intended by so doing, was to make a loan of a portion of her own property, to her husband's estate.

We submit that the whole of the evidence in this case, shows

(a) 2 Vez. 663.

(b) 2 Vez. jun. 488.

(c) Ibid. 698.

(d) 2 P. W. 82.

(e) 4 Bro. C. C. 409.

(g) *Ante*, Vol. IV, p. 588.

(h) 8 Bligh, (N. S.,) 224.

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nothing more than, that Lady Waterford, having a landed estate which was very heavily incumbered, wished (as it was very natural for her to do) to relieve herself from a duty for which she was not qualified, and to leave the application of the rents and the general management of the estate to her husband.

Mr. *Stuart* and Mr. *Bruce*, and Mr. *James Russell* and Mr. *Vansittart Neale*, in support of the report:—It has been said that property settled on a married woman for her separate use, continues her property, unless there is evidence of her having made an actual gift of it to her husband. But we assert the law to be that, if a wife sees her husband receive her separate property, and does not make any claim to it during his lifetime, a gift of it will be presumed; that is, her acquiescence in the receipt of it by her husband, amounts *to a gift by her. [*648] Besides, there is evidence in this case that Lady Waterford did make an actual gift of her separate property, to Lord Waterford: for she joined in directing Carr to pay the rents to which she was entitled, to Hoare & Co., to the separate account of Lord Waterford: the consequence of which was that she renounced her right to the rents, and they were placed at his absolute, uncontrolled disposal. After Lord Waterford's death, the balance of the rents was transferred to the account of his executors. Whether that act was done by her direction or not, is immaterial; for she suffered the balance to remain to that account, and she dealt with it as part of her husband's assets. In addition to that, it appears, from the evidence before the master, that she paid to Hoare & Co., the sum of 615*l.*; which had nothing to do with the rents of the Fordcastle estate, but which she had received in respect of the dividends of a sum of stock, the property of her late husband. *Whistler v. Newman*; (a) *Dalbiac v. Dalbiac*; (b) *Squire v. Dean*; (c) *Ridout v. Lewis*; (d) and the observations made by the Lord Chancellor on *Powell v. Hankey* and *Smith v. Lord Camelford*, in his judgment in *Digby v. Howard*.(e)

(a) 4 Ves. 129.

(b) 16 Ves. 116.

(c) 4 Bro. C. C. 336.

(d) 1 Atk. 269.

(e) *Ante*, Vol. IV, pp. 601 & 603.

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The *Solicitor-General*, in reply, commented on Lord Waterford having left at his death, so large a balance as 11,000*l.* in the hands of Hoare & Co., when he had a balance of 900*l.* only in the hands of his own bankers; and on Lady Waterford having joined with him in signing an authority to Carr, to distrain on one of the tenants of the Fordcastle estate whose rent was [*649] in arrear; *and he referred to *Parker v. Brook*,(a) and 2 Roper on Husb. and Wife, 220 & 221.

THE VICE-CHANCELLOR:—I do not feel any difficulty on the point; because it seems to me that there is sufficient evidence of an actual agreement, by Lady Waterford, that her husband should have the complete and absolute dominion over all the rents of the Fordcastle estate to which she was entitled.

Under the will of Lord Delaval, she was tenant for life, for her separate use, of the surplus rents after keeping down the interest of the incumbrances: and the effect of the transaction which took place at the time when she married Lord Beresford, was that she herself was the owner of 1,000*l.* a year, payable out of the interest of the incumbrances: so that, at the time when her life estate came into possession, she was the beneficial owner of the Fordcastle estate, to the amount of 1,000*l.* a year more than she would have been if that transaction had not taken place.

Having regard to the evidence on which the master's report is grounded, it is manifest that Lady Waterford did mean that Lord Waterford should have the absolute dominion over all the rents of the estate; and, in point of fact, he had the absolute dominion over them; and there was nothing like a restitution by him to her, or a payment by him to her, which at all derogated from that absolute dominion.

It was said that all the payments which he made, were merely for keeping down the interest of the incumbrances. But [*650] that is not strictly accurate. For *instance, the sum of 3,051*l.* was paid for the furniture sold to him but not to

(a) 9 Ves. 583.

1844.—Beresford v. The Archbishop of Armagh.

her. It was his furniture ; and though, as between husband and wife, it might have been immaterial who became the purchaser ; he was the purchaser in fact, and the money was paid by him. Then there was a further sum of 1,072*l.* 7*s.*, a considerable portion of which was paid for the personal expenses and debts of the marquis. In addition to which it is quite clear that no payment was made to the marchioness, during her husband's lifetime ; and it is indisputable that *that* could not have taken place without her knowledge. So that there was an acquiescence by her, during the whole of her husband's lifetime, in the consequences of that very act which took place immediately after her mother's death ; and the fund remained, completely, under the dominion of the marquis down to the day of his death. Anything that took place afterwards cannot affect the case. It was said, indeed, that the marchioness claimed the balance which remained at Hoare's : but she sustained the character of the sole proving executrix of her husband's will ; and nothing that she did in the way of claim, after the marquis' death, could affect the case ; the question being whether, *at the death of the marquis*, the fund was not his.

With reference to an observation which the *Solicitor-General* made, namely, that it was extraordinary that there should be so large a balance standing to the Marquis' account at Hoare's, at his death, I must say, that it does not appear to me to be at all extraordinary : for it is not by any means unusual for noblemen and great landed proprietors to keep large balances at their banker's to answer any sudden emergencies that may arise. Besides, there is a passage in one of the affidavits *men- [*651] tioned in the report, which accounts for the magnitude of the balance. I allude to the affidavit of Mr. O'Meara, an Irish gentleman, who states that he was the agent of the marquis in respect of his estates in Ireland, and lived in habits of great intimacy with him : that, on two or three occasions, the marquis, in conversation with the deponent, adverted to his English property, and expressed his anxiety to comply with the marchioness' wish that the proceeds of the Fordcastle estate, should be allowed to accumulate for the benefit of his younger children.

 1844.—*Inderwick v. Inderwick.*

Now that wish shows that the marchioness had no intention of claiming the balance as belonging to herself. And the marquis, very probably, intended to reserve it for the purpose of augmenting the fortunes of his younger children, without making any investment of it in the names of trustees, which would have deprived him of the dominion which he had over it as a floating balance. In my opinion, however, the fact that he had so large a balance under his control, is no evidence whatever that he acknowledged any right in it as belonging to his wife. The consequence is that the exception must be overruled.

[*652]

INDERWICK v. INDERWICK.Will.—Construction.*

1844: 19th January.

Testatrix concluded her will as follows: "My house in Trevor square I give to my brother, as residuary legatee of my remaining property, for the benefit of his children:" Held, that the brother took the residue as well as the house, in trust for his children.

THE testatrix in this cause, after giving some pecuniary legacies, concluded her will in the following terms:—

"My house in Trevor square, I give to my brother John, as residuary legatee of my remaining property, for the benefit of his children:" and she appointed her brother and another person, the executors of her will.

Mr. *Stuart* and Mr. *Malins* for the children, said that, under the above bequest, the testatrix's brother was a trustee, of both the house and residue, for his children.

Mr. *Walker* and Mr. *Cockerell* for the brother, said that there could be no doubt that he took the residue as well as the house; but that he took the former for his own benefit, and the latter, for the benefit of his children, that is, that the bequest ought to be con-

1844.—Croft v. Waterton.

strued as if it had stood thus: "My house in Trevor square I give to my brother John (who is my residuary legatee) for the benefit of his children:" that, by mentioning the house, the testatrix showed that she intended to make a distinction between it and the residue.

Mr. *Bethell* and Mr. *Briggs* for the testatrix's next of kin, contended that the bequest on which the question arose, was unintelligible with respect to its subject as well as its objects, and that, therefore, it was void for uncertainty.

*THE VICE-CHANCELLOR:—The testatrix has ex- [*653] pressed herself very laconically, throughout her will. But it seems to me that she has constructed the final sentence of it, so as to make her brother John a trustee, of both the house and residue, for his children.

As she speaks of her brother as her residuary legatee, it is manifest that he is legatee of the residue.

CROFT v. WATERTON AND OTHERS.—WATERTON v. CROFT AND OTHERS.

Administration ad litem.—Pleading.—Parties.

1844: 22d January.

The court will not decree a general account and administration of assets, in a suit in which the deceased is represented by an administrator *ad litem* merely.

JAMES and Thomas Croft were parties to the above mentioned suits as creditors of Ann Waterton, deceased, and also as representing her by virtue of letters of administration *ad litem*, obtained by them on the death of Edward Birmingham, to whom *general* letters of administration of her estate had been granted.

Mr. *Stuart* and Mr. *Fleming* for Charles Waterton, one of the defendants, objected, at the hearing, that, on account of the limited

1844.—*Croft v. Waterton.*

nature of the letters of administration granted to the Messrs. Croft, the court ought not to decree and, indeed, could not decree an account and administration of the general assets of Ann Waterton. They cited *Clough v. Dixon*.^(a)

THE VICE-CHANCELLOR:—I do not see how the defect occasioned by the death *of the general administrator, is supplied. If there is to be an administration of the deceased's general personal estate, can the suit proceed without having a general administrator before the court?

Mr. Bethell and Mr. Bagshawe for the Messrs. Croft :—Letters of administration *ad litem*, are commonly granted where the suit relates to part only of the deceased's estate; but, by the letters of administration which have been granted to the Messrs. Croft, authority is given to them to the full extent of the administration of Ann Waterton's estate; for they were granted to them for the purpose to become and be made parties to the suit, and to attend, supply, substantiate and confirm the proceedings already had, or that should or might be thereafter had, in the suit or in any other cause or suit which might be, or might have been commenced, in this or any other court, between the parties to the suit or any other parties, touching or concerning the matters at issue in the suit, and until a final decree should be made therein and the decree carried into execution and the execution thereof fully completed. So that the dimensions of the suit and of the letters of administration, are precisely the same.

This case is distinguishable from *Clough v. Dixon*; for, in that case, the limited letters of administration were granted, not of the estate of Ann Dixon, the original intestate, but of the estate of T. R. Dixon, who had been one of her administrators; and, consequently, the limited administrator did not at all represent Ann Dixon, and could render no account, whatever, of her [*655] assets, which it was the principal object of the suit to *obtain. In the present case, the letters of administration

(a) *Ante*, Vol. X, p. 564.

1844.—*Croft v. Waterton.*

obtained by the Messrs. Croft, are letters of administration of the estate of Ann Waterton, the original deceased party; and they are granted for every purpose sought to be obtained in the suit.

Mr. *Lloyd*, Mr. *Cooke*, Mr. *Bacon* and Mr. *Rolt* appeared for other parties.

THE VICE-CHANCELLOR:—In my opinion, the objection founded on the limited nature of the letters of administration which have been granted to the Messrs. Croft, must be allowed: for if, at any future period, general letters of administration to Ann Waterton, are taken out, the person to whom they are granted, will not be bound by any of the proceedings in this suit. Now one of the objects which the Messrs. Croft seek to obtain, is to have certain property which is in the possession of Robert Waterton, one of the defendants in the first suit and the plaintiff in the second suit, accounted for and applied as part of the assets of Ann Waterton. Robert Waterton, however, contends, as I understand, that that property does not form part of the assets of Ann Waterton, but belongs to himself: and, if I should so decide and the general administrator should be dissatisfied with my decision, there would be nothing to prevent him from instituting a new suit for the purpose of having the question determined a second time. On the other hand, if I were to hold that the property formed part of the assets of Ann Waterton, and were to direct an account to be taken of it, the general administrator might, if he pleased, file a new bill for the purpose of having the account taken over again.

*For these reasons I think that the causes now before [*656] me, are defective; and I shall order them to stand over, with liberty to the plaintiffs to add parties as they may be advised.



AN INDEX TO THE PRINCIPAL MATTERS.

A ACCOUNT.

See MAINTENANCE, 2.

ACKNOWLEDGMENT OF TITLE.

A. mortgaged an estate to B. for 1,000 years. B. died, having bequeathed the mortgage to his widow. She also died; and, in 1822, her personal representatives entered into and continued in possession of the estate until 1838, when they sold and assigned the mortgage to C., who entered and continued in possession until 1843, when A.'s heir filed a bill to redeem, on the ground that the deed of assignment recited the mortgage and conveyed the term to C., subject expressly to the equity of redemption of A. or his legal representatives: Held, that the deed was not such an acknowledgment of the mortgagor's title as to make the estate redeemable. *Lucas v. Dennison*, 584

as his own property, and ultimately bequeathed them specifically to C.; and he gave certain other chattels, which always had been his own property, to D., and died possessed of but very little other property, leaving some of B.'s debts unpaid, and a balance due from him in respect of his receipts and payments on account of B.'s estate. At his death, the canal shares remained standing in B.'s name: Held, that those shares were not exclusively applicable to pay B.'s unsatisfied debts; but that A.'s general personal estate must be applied first, and that C. and D. must contribute to make up the deficiency, in proportion to the value of the articles bequeathed to them respectively. *Ibbelton v. Ibbelton*, 544

2. The court will not decree a general account and administration of assets, in a suit in which the deceased is represented by an administrator *ad litem* merely. *Croft v. Waterton*, 653

See ASSETS.

ACQUIESCENCE.

See HUSBAND AND WIFE.

ADEMPTION.

See CONVERSION.

ADMINISTRATION.

1. A., the executor of B., dealt with canal shares, which had belonged to B.,

AFFIDAVIT.

The plaintiff's title to the relief prayed depended upon A. (whose administrator he was) having survived B. The answer stated that the defendant did not know and could not set forth, whether A. did survive B. or whether A. was living or dead. The plaintiff, in support of a motion for a receiver and for payment into court of money in the defendant's hands, produced an affidavit to prove that A. died after B., and to prove also a letter alleged to have been written by the de-

defendant to the plaintiff's solicitor, and to contain an admission of the fact. The answer denied that the defendant wrote the letter, but added that it might have been written by some person in the habit of being about him: Held, that the affidavit was not admissible. *Edwards v. Jones*, 632

AGREEMENT.

A. being tenant for life of an estate, with remainder to his sons, successively, in tail male, entered into an agreement with B., by which it was stipulated that A. should procure an act of Parliament to enable him to sell the estate to B.; and that B. should bear all the expenses incident to and consequent upon his proposal to purchase the estate, together with the expense of obtaining the act, of preparing the abstract and showing a title to the estate, and of and about making and completing the sale and conveyance to him, together with the expense of the agreement, and all other expenses whatsoever of A., in consequence of the sale, or arising out of or in any way relating thereto, or to the proposal of B. A. accordingly obtained an act for the sale of the estate to B., which directed the purchase money to be invested in lands to be settled to the same uses as the estate stood limited to: Held, that B. was not bound to pay the expenses of the investment. *In re London Bridge Act*, 180

See COVENANT, 1, 2.

SPECIFIC PERFORMANCE.

ALLOTMENT.

See INTEREST, 1.

AMENDED BILL.

See DEMURRER.

AMENDMENT.

An order to amend as the plaintiffs may be advised, does not authorize the names of co-plaintiffs to be struck out. *Sloggett v. Collins*, 456

ANNUITY.

The grantor of an annuity had admitted, in his answer to a bill in Chancery,

that the annuity was a subsisting charge on his estates, and the decree and proceedings in the suit had treated the annuity as valid. Under those circumstances, the grantor's devisee was restrained from proceeding at law, to set aside the annuity for want of a memorial. *Roberts v. Madocks*, 549

APPEARANCE.

See NEW ORDERS, 4, 5.

APPOINTMENT.

1. Testator gave 7,000*l*. stock to trustees, in trust to pay the dividends to his son for life, and after his death, to pay the capital and dividends to and amongst all his children, at such time or times, age or ages, and in such proportions, manner and form, and for such intents and purposes in all respects, as the son should appoint; and, in default of appointment, to pay and divide the same unto and equally amongst all the children, as they should severally attain twenty-one, and, in the meantime, to apply the dividends for their maintenance as the trustees should think fit. The son, by his will, directed that the stock should not be divided amongst his children until their mother's death, and that she should receive the dividends during her life, and apply the same, in the exercise of her sound discretion, for the best interest and advantage of his children, and that, on her death, the capital should be divided amongst the children in certain proportions. The son left eleven children, some of whom were adult: Held, that the son's will was not a good execution of the power, so far as it directed the dividends of the stock to be paid to his wife during her life. *Chester v. Chadwick*, 102

2. Under a marriage settlement, the husband and wife, having power to appoint 10,000*l*. amongst all their younger children, but in such shares as they should think fit, appointed the whole, in different sums and at different times, to four of the younger children, to the exclusion of the rest: Held, that the three first appointments were good, and only the last, void. *Young v. Lord Waterpark*, 202

3. A married lady having power, under her settlement, to dispose of real and personal property, to which her husband was entitled for his life; and her husband having agreed, subsequently to the mar-

stage, that certain other personal property should be disposed of by her, in such manner as she thought proper, made a will commencing as follows: "I, Ann B., the wife of W. B., by the authority of my marriage articles, do make this my last will and testament. Whereas my husband is entitled to the whole of the rents and profits of my estates, both real and personal, during his life; from and after the decease of myself and my husband, I do hereby give, &c." The testatrix then proceeded to dispose of the property comprised in her settlement: and, after appointing executors, she gave *all the rest, residue and remainder of her property*, both real and personal, to G. H.: Held, that the will was an appointment of the property comprised in the post-nuptial agreement, as well as of that comprised in the settlement. *Harrington v. Harrington*, 318

4. A. had power to appoint a fund amongst all the children of B., *begotten and to be begotten, and their issue*, and, in default of appointment, the fund was given to the children equally. B. had only six children, all of whom were living when the power was created. A. directed by his will that *the share* which every child of B. *begotten or to be begotten*, was entitled to in default of appointment, should be held in trust for that child for life, and, after its death, *for its children*: Held, that the appointment was not void for remoteness. *Griffith v. Pownall*, 393

5. Testatrix having a testamentary power of appointment in favor of her children, over certain sums of stock standing in the names of A. and B., as trustees, gave and bequeathed, and, *by virtue of every power enabling her in that behalf, appointed* all the property of or to which, she was then, or, at the time of her death, should or might be possessed or entitled *or have power to dispose*, to A. and B., upon trust, *after payment of her debts and funeral and testamentary expenses*, to invest the *residue* thereof, in their names, in the funds, or upon government or real security; and she then declared trusts in favor of her children. She died possessed of personal estate more than sufficient to pay her debts and funeral and testamentary expenses: Held, that her will was not an exercise of the power. *Clogstown v. Walcott*, 523

ASSETS.

A., the executor of B., dealt with canal shares, which had belonged to B., as his

own property, and ultimately bequeathed them specifically to C.; and he gave certain other chattels, which always had been his own property, to D., and died possessed of but very little other property, leaving some of B.'s debts unpaid, and a balance due from him in respect of his receipts and payments on account of B.'s estate. At his death, the canal shares remained standing in B.'s name: Held, that those shares were not exclusively applicable to pay B.'s unsatisfied debts; but that A.'s general personal estate must be applied first, and that C. and D. must contribute to make up the deficiency in proportion to the value of the articles bequeathed to them. *Ibbetson v. Ibbetson*, 544

ASSIGNEE OF BANKRUPT.

A married lady filed a bill against her husband (who had become bankrupt) and his assignee, alleging that a sum of stock which had fallen into possession after the bankruptcy, was subject, under the circumstances stated in the bill, to the trusts of her settlement, and did not belong to the assignee. The assignee submitted the question to the court. The court decided that the fund was subject to the trusts of the settlement, and refused to give the assignee his costs, as he ought to have disclaimed. *Bythe v. Granville*, 190

ASSIGNMENT.

The interest of a sum, secured by a mortgage of tithes, being in arrear, the mortgagor wrote and gave to the mortgagee, a letter to the lessee of the tithes, desiring him to pay the sum in arrear, to the mortgagee, and to charge it to the mortgagor, in settling for the tithes of the current year. The mortgagor sent the letter to the lessee, who undertook to pay the amount within a certain time. The payment, however, was never made: Held, that the letter was not an assignment in equity, to the mortgagee, of a debt due from the lessee to the mortgagor, but was an order for payment of money, which could not be enforced, because it was not stamped. *Lord Braybrooke v. Meredith*, 271

ASSIGNMENT PENDENTE LITE.

Some of the plaintiffs, who had an equitable interest only in the property in question, mortgaged their interests pending

the suit: Held, at the hearing, that the mortgagee was a necessary party. *Solomon v. Solomon*, 516

AUCTIONEER.

See CONDITIONS OF SALE.

B

BANKRUPT.

1. Bill by a *cestui que trust*, against the assignees of the trustee who had become bankrupt, for an account and payment of what was due in respect of a breach of trust committed by the bankrupt, and to restrain the assignees from distributing his estate amongst his creditors. The court refused the injunction; because it had no jurisdiction to interfere with the administration of a bankrupt's estate at the suit of a person claiming as a general creditor. *Halford v. Gillow*, 44

2. The court of bankruptcy has exclusive jurisdiction to deal with what is admitted to be the bankrupt's estate; but a court of equity or a court of law (as the case may be) has jurisdiction to determine what is or is not the property of the bankrupt. *Ibid.*

See ORDER AND DISPOSITION, 1, 2.

BIDDINGS (OPENING OF.)

Biddings opened on an advance of 60*l.* on 430*l.* *Bourn v. Bourn*, 189

BILL OF DISCOVERY.

The discretion given to the court, by the 41st order of August, 1841, as to the costs of a cross bill of discovery, cannot be exercised before the hearing of the original suit, although the plaintiff in it dismisses his bill immediately after putting in his answer to the cross bill. *Skipworth v. Westfield*, 265

C

"CASH OR MONEYS SO CALLED."

See WILL, 18.

CHARGING ORDER.

On a *petition*, by a judgment creditor of a party to a suit, who had obtained a

charging order on a fund in court, to which the party was entitled, the court refused to order the fund to be paid to the petitioner, without the party's consent. *Whitfield v. Prickett*, 259

CHARITY.

1. Testator gave to T. R. 15,000*l.*, to be by him applied for the use of Roman Catholic priests, in and near London, at his absolute discretion. T. R. died in the testator's lifetime: Held, that the legacy was not void for uncertainty, and did not lapse by T. R.'s death in the testator's lifetime, but was good as a charitable legacy; and that it must be applied for the benefit of persons filling the character of Roman Catholic priests in and near London, at the testator's death, and afterwards, according to a scheme to be approved by the master. *The Attorney-General v. Gladstone*, 7

2. Testator gave his residuary estate (which amounted to 13,000*l.*) to his executors, to be by them appropriated to the education of the children of the poor in Ireland, principally those in or about Limerick: Held, that legacy duty was payable on the residue. *The Attorney-General v. Fitzgerald*, 83

CHOSE IN ACTION

By articles entered into on the marriage of a female infant, she and her intended husband agreed to assign, on her attaining twenty-one, a share of her deceased grandfather's residuary estate to which she was entitled under the trusts of his will, to trustees, in trust for themselves and their children; and, after the lady had attained twenty-one, a settlement was made in pursuance of the articles; but before the settled property was transferred to the trustees, the husband died: Held, that the wife's right to the property by survivorship, was not barred. *Ellison v. Elwin*, 309

CIVIL AND CANON LAW.

See NEAREST OF BLOOD, 1, 2.

COLLATERALS.

See VOLUNTARY SETTLEMENT.

COMMISSION.

If an executor in India collects part of the assets there, and then comes to England, and has the remainder remitted to him, by his agent, he is entitled to commission on that part only which he collected in India. *Campbell v. Campbell*, 168

COMMISSION OF LUNACY.

After decree a commission of lunacy issued against the plaintiff, who, being a married woman, was suing by her next friend. The court, on the application of her husband, a defendant, stayed the proceedings in the suit until the result of the proceedings under the commission was known. *Hartley v. Gilbert*, 596

COMPOUNDING A MISDEMEANOR.

Securities given by the plaintiff, to prevent a prosecution for cheating at cards, decreed to be delivered up. *Osbaldiston v. Simpson and others*, 513

CONDITIONS OF SALE.

1. Conditions of sale stipulated that the sale should be completed on a certain day; and that objections to the title not made within twenty-one days from the delivery of the abstract, should be considered as waived; and that, if the purchaser should not comply with the conditions, his deposit should be forfeited, and the vendor be at liberty to resell the property. The purchaser did not deliver his objections until several weeks after the expiration of the twenty-one days, and after the day appointed for completing the purchase: the vendor's solicitor, however, received them, and entered into a long correspondence with the purchaser on the subject of them, but without coming to a satisfactory conclusion. Finally, the vendor resold the property, (but at a less price,) notwithstanding the purchaser protested against the resale, and gave notice to the vendor of his intention to file a bill to enforce the contract. About six months afterwards he filed his bill, making the auctioneer and the purchaser at the resale, to whom he had, some months before, given notice of his prior contract, co-defendants to it. The court held that the benefit of the conditions had been waived by the vendor's solicitor, and decreed a specific performance, with a reference to the master as to title;

and dismissed the bill with costs, as against the auctioneer, because he denied that he had ever intended to part with the deposit, and without costs as against the purchaser at the resale, who claimed the benefit of his contract, if the court should think that the plaintiff's ought not to be performed. *Cutts v. Thodey*, 206

2. Where objections to title are to be considered as waived, unless made within a certain time after the delivery of the abstract: *Qu.* whether that condition can be insisted on, if the abstract is very defective? *Ibid.*

CONSANGUINITY.

See NEAREST OF BLOOD.

CONSTRUCTION.

1. Pending a suit for tithes, between a rector and occupier, (in which the latter set up a modus,) the tithe commutation act passed; and, in the course of the proceedings under it, an action was brought, in pursuance of one of its enactments, by the rector against the land owner, in order to try the validity of the modus. At the trial a verdict was found against the modus: Held, that the verdict was admissible as evidence against the occupier, and, consequently, that the rector was entitled to file a supplemental bill for the purpose of putting the proceedings at law in issue in his suit against the occupier; and that, too, notwithstanding the act enacts that nothing therein contained shall effect the right to any tithes become due before the commutation. *Morris v. Ellis*, 1

2. Testatrix gave to the eldest son of her daughter who should be living at her own decease, ten guineas, and added that she left him no larger sum, because he would have a handsome provision from the estate of her late husband and the estate of his own father, (who was still alive,) and she gave the residue of her property to all the children of her daughter, except the daughter's eldest son, or such of her sons as, by the death of an elder brother, should become an eldest son, equally to be divided amongst them when the youngest should attain twenty-one. The daughter's eldest son was provided for in the manner mentioned, but he died before the youngest child attained twenty-one, and the provision did not devolve upon the daughter's second son: Held, nevertheless, that the latter was

excluded from participating in the residue. *Livesey v. Livesey*, 33

3. Testator directed his trustees to sell his real and personal estate, and to pay the interest of the proceeds to his daughter for life, and, after her death, to assign the principal and the parts of his real and personal estate remaining unsold (if any) to her children, when they should attain twenty-one; and, if his daughter should die without leaving issue, or leaving issue, all of them should die under twenty-one and without issue, then to assign the proceeds and the parts of his real and personal estate remaining unsold (if any) to his personal representatives, his, her or their heirs, executors, administrators and assigns. The daughter, who was the testator's next of kin, at his death, died without having had a child: Held, that by "issue," the testator meant "children;" and that the persons who were his next of kin at his daughter's death, were entitled under the ultimate trust. *Minter v. Wraith*, 52

4. Testator bequeathed his residuary estate to trustees in trust, to pay the interest to his niece for life, and directed, that, after her death, the trustees should pay, apply, transfer and dispose of the residue amongst her children, equally to be divided between them, share and share alike, to be paid to sons at twenty-one, and to daughters at that age or on their marriage: and he empowered the trustees, after his niece's decease or in her lifetime with her consent, to raise, pay and apply, for the preferment and advancement of any of her children, all or any part of their presumptive portions under the trusts aforesaid: Held, that there was no gift to the children, except in the direction to pay to them; and, therefore, their portions did not vest in them until such of them as were sons attained twenty-one, and such of them as were daughters either attained that age or married. *Chevauz v. Aislaby*, 71

5. Testator devised his estates to trustees, in trust to settle and convey the same to the use of or in trust for G. R. (who had then no issue) for life, without impeachment of waste, with remainder to his issue in tail male, in strict settlement: Held, that the words "in tail male" were descriptive, not of the issue, but of the interest that they were to have; and that the estates ought to be settled on G. R. for life, without impeachment, &c., with remainder to his sons, successively, in tail male, with remainder to his daughters

as tenants in common in tail male, with cross remainders in tail male. *Trevor v. Trevor*, 108

6. Testator directed a settlement to be made of his estates, and a power to be inserted in it, enabling the tenant for life to jointure any wife or wives, at one or several times, to the extent of one-fifth part of the then ordinary annual rental of the estates: Held, that the settlement ought to authorize the tenant for life to charge the estates with a clear yearly rent charge, not exceeding one-fifth of the yearly rent of the estates payable at the time of creating the charge. *Ibid.*

7. Testator made two wills, one of his estates in Sussex, and the other of his estates in Bedfordshire. By the latter, he devised those estates to trustees, in trust to settle them on G. R., who was heir to the barony of D., for life, with remainder to his issue in tail male, in strict settlement: "Upon the like condition to that I have made in my will of my Sussex estates, so far as the change of circumstances will permit, that the said estates shall go over to the party next entitled, on the person for the time being possessed, becoming entitled to the barony of D." Held, regard being had to the will of the Sussex estates, that the succession of a child or any male issue of a child of G. R. to the barony, ought not to exclude that child, or his issue male, from the enjoyment of the Bedfordshire estates, unless some other child, or the issue male of some other child of G. R. were in existence, to whom those estates might go over. *Ibid.*

8. Testator directed his estates to be settled on G. R. for life, with remainder to his issue in tail male, in strict settlement; upon condition that all persons from time to time to come into possession of the estates, should take and use his name and arms; Held, that the estates ought to be settled on G. R. for life, with remainder to his sons, successively, in tail male, with remainder to his daughters as tenants in common in tail male, with cross remainders in tail male; and that the proviso to be inserted in the settlement, as to taking the name and arms, and for giving over the estates on default, ought to be so expressed, as to take away the estates from the defaulting party and his descendants only; that is, if a grandson of G. R. were the defaulting party, the consequence ought not to extend to his younger brother. *Ibid.*

9. Testator bequeathed his residue to his first cousins, the children of his father's brother, of the name of C. The testator's father had two brothers of the name of C.; both of whom had left children: Held, that the bequest was not void for uncertainty; but that the children of both the brothers were entitled to share in the residue. *Hare v. Cartridge*, 165

10. A. being tenant for life of an estate, with remainder to his sons, successively, in tail male, entered into an agreement with B., by which it was stipulated that A. should procure an act of Parliament to enable him to sell the estate to B.; and that B. should bear all the expenses incident to and consequent upon his proposal to purchase the estate, together with the expense of obtaining the act, of preparing the abstract and showing a title to the estate, and of and about making and completing the sale and conveyance to him, together with the expense of the agreement, and all other expenses whatsoever of A., in consequence of the sale, or arising out of or in any wise relating thereto, or to the proposal of B. A. accordingly obtained an act for the sale of the estate to B., which directed the purchase money to be invested in lands to be settled to the same uses as the estate stood limited to: Held, that B. was not bound to pay the expenses of the investment. *In re London Bridge Acts*, 180

11. By a marriage settlement, 1,500*l.* and 2,700*l.* stock, of which the lady was possessed, were settled in trust for her separate use for life, remainder in trust for her intended husband for life, and after his death, as the wife should appoint by will: and the intended husband covenanted that, if the marriage should take effect, he would, as often as occasion should require, join with his wife, in doing all necessary acts for assigning to the trustees all the property to which his wife should become entitled during the coverture, upon the trusts declared of the 1,500*l.* and 2,700*l.* stock. At the date of the settlement, the wife had an absolute vested interest in 1,935*l.* stock, expectant on her father's death, but it was not mentioned in the settlement. During the marriage, the husband became bankrupt, and then the wife's father died: Held, that the 1,935*l.* stock did not belong to the husband's assignee as part of his estate, but was bound by his covenant, as being property to which the wife would become entitled during the coverture. *Blythe v. Granville and others*, 190

12. Where the tenant for life is a married woman, whose husband has been convicted of felony, the Court of Chancery is the protector of the settlement, though the life estate is not her separate property. *In re Wainwright*, 260

13. The discretion given to the court, by the 41st order of August, 1841, as to the costs of a cross bill of discovery, cannot be exercised before the hearing of the original suit, although the plaintiff in it dismisses his bill immediately after putting in his answer to the cross bill. *Skipworth v. Westfield*, 265

14. Testatrix bequeathed the residue of her funded property, in trust for her niece for life, and, after her death, to be equally divided amongst all her children, whether sons or daughters, share and share alike; in case it should happen that there was but one child at the niece's death, then to go to that one only child; and in case of failure of issue, to go as the niece should appoint by her will. The niece had eleven children; three of whom died in her lifetime: Held, that all the children took vested interests, and, as more than one survived their mother, there was no divesting of interests. *Templeman v. Warrington*, 267

15. Testatrix bequeathed a leasehold house and 3,000*l.* stock to trustees, in trust to permit her daughter to receive the rents and interest for life, for her separate use; and, from and immediately after her daughter's decease, she gave the rents and interest to the heirs of the body of her daughter lawfully begotten; but, in case her daughter should happen to die without leaving any lawful issue living at the time of her decease, she gave the house and the stock over: Held, that the daughter took the property absolutely. *The Earl of Verulam v. Bathurst*, 374

16. Testator devised all his real estates to trustees; as to his freehold messuage, farm, lands and hereditaments in the county of B., in trust for C. The testator had a farm in that county, consisting of a messuage and 116 acres of land, of which the messuage and the greater part of the land were freehold, and the other parts leasehold for long terms of years at peppercorn rents; and they were interspersed with and undistinguishable from the freehold part, and had been demised therewith as one farm, at one entire rent, and the testator had always treated and dealt with them as freehold: Held, nevertheless, that the leasehold parts were

not comprised in the trust. *Stone v. Greening*, 390

17. Testator bequeathed his residue to trustees, in trust for J. F., for life, and, after her death, for her children; but in case J. F. should survive her mother, and die without having had lawful issue, then in trust for the brothers and sisters of J. C. But in case J. F. should die in the lifetime of her mother without lawful issue, then the testator directed the trustees to retain, out of the residue, sufficient to produce 150*l.* a year, and to pay the annual produce to the mother for life; and, after her decease, he gave the principal so to be retained to the person or persons who would be entitled thereto in case J. F. had survived her mother and died without lawful issue. J. F. died without issue in her mother's lifetime: Held, that the whole of the residue, except the fund for paying the annuity, was undisposed of. *Clarke v. Butler*, 401

18. A testator having three and a half per cents, East India stock, Danish bonds, and other property, bequeathed to his wife, during her widowhood, the interest of all the money he had or might possess in the funds or other securities: "And I further bequeath, to my wife, the interest of any other property I do or may possess, to be enjoyed by her so long as she remains single:" Held, that the testator's widow was entitled, as against the residuary legatees, to enjoy, *in specie*, every portion of her husband's property which came within the description of money in the funds or other securities, and, consequently, his three and a half per cents, East India stock and Danish bonds. *Oakes v. Strachey*, 414

19. Testator bequeathed 10,000*l.* in trust for his son, J. L. J., for life, remainder in trust for the children of J. L. J., when and as they should attain twenty-one, as tenants in common; and, if any of them should die before their shares became payable, leaving issue, their shares to be paid to their issue; but if any of them should die before their shares became payable, leaving no issue, their shares to be paid to the survivors at the same time as their original shares should become payable; and if J. L. J. should have no child, or, having such, they should all die under age and without issue, then the trust fund to sink into the residue, which the testator gave to two of his other children. J. L. J. had four children, all of whom attained twenty-one. One of them died, in his lifetime, without issue: Held, that

"payable" meant "attain twenty-one," and, consequently, that one-fourth of the fund vested in the deceased child. *Jones v. Jones*, 561

20. A testatrix, in her will, used the following expression: "Observing that F. Beales and his family are my residuary legatees for all but cash or moneys so called." F. Beales had nine children living at the date of the will and at the testatrix's death, and the testatrix died possessed of a promissory note payable to herself or order, some long annuities, Columbian bonds and money in her house and at her banker's: Held, that by "Francis Beales and his family," the testatrix meant Francis Beales and his children, and that they took the note, annuities and bonds, as joint tenants, those articles being neither cash nor moneys so called. *Beales v. Crisford*, 592

21. Testator directed one-half of the interest of his residue to be paid to his daughter and only child, and the other half to his wife, during their joint lives; and that, if his daughter survived her mother, or married and left issue, then that the whole of the capital should be paid to her, after his wife's death; but if she died first, without marrying or leaving issue, then that the trustees should accumulate the interest of the residue so far as it was not directed to be paid to his wife; and that, on her death, one-half of the capital should be divided amongst his nearest of kin, and the other half amongst his wife's nearest of kin. The daughter was the testator's nearest of kin at his death. She died a spinster, before her mother. At the mother's death the testator's sister was his nearest of kin: Held, that by "my nearest of kin," the testator meant his nearest of kin at his own death, and not at the death of his wife; and, consequently, that the personal representative of his daughter, and not his sister, was entitled to one moiety of the residue. *Urquhart v. Urquhart*, 613

22. Testatrix concluded her will as follows: "My house in Trevor square I give to my brother, as residuary legatee, for the benefit of his children:" Held, that the brother took the residue, as well as the house, in trust for his children. *Indervick v. Indervick*, 652

See CHARITY, 2.

DEED.

EXONERATION OF PERSONAL ESTATE.

INTEREST.

LEGACY, 2, 4, 6, 7, 10.

NEAREST OF BLOOD.
PARENT AND CHILD.
WILL, 19

CONSTRUCTION OF 3 & 4 WILL IV,
c. 74.

1. Where the tenant for life is a married woman, whose husband has been convicted of felony, the Court of Chancery is the protector of the settlement, though the life estate is not her separate property. *In re Wainwright*, 260

CONSTRUCTION OF 3 & 4 VICT., c. 55.

2. The court is *functus officio* when it has confirmed the master's report sanctioning the draining of a settled estate, under 3 and 4 Vict. c. 55. What remains to be done under the act is to be done by the master and not by the court. *Ex parte Mills*, 591

CONSTRUCTION OF 5 & 6 W. IV,
c. 76, AND 7 W. IV, AND 1 VICT. c. 26,
SEC. 27.

See DEBT.
POWER, 1.

CONTEMPT.

1. A *habeas corpus* issued to bring up the body of a ward of court who had been taken in execution in an action by a tradesman, for necessities, and the tradesman was ordered to attend at the bar of the court at the same time. *Bond v. Roberts*, 400

2. It is a breach of an injunction to stay trial, to obtain an order to change the venue in the action. *Pariente v. Ben-susan*, 522

CONVERSION.

The Common Council of London, being empowered, by a local act of Parliament, to take a freehold house belonging to A. for the purposes of the act, at the expiration of six months after notice given of their intention to take the same, served A. with the required notice in September, 1840. The amount of the purchase money was afterwards agreed upon, and an abstract of A.'s title was sent to the common council. In April, 1841, he died, having, by his will, dated in 1837, devised his real estate to B. and his residuary personal estate to C.: Held, that the

purchase money (which, after A.'s death, was paid into court under the act) was to be considered not as part of his real, but as part of his personal estate; and that, all his debts, &c., having been paid, it belonged to his residuary legatees. *Ex parte Hawkins*, 569

See REVOCATION, 2.

CORPORATION.

See DEBT.

COSTS.

1. If an estate is devised to A. and his heirs upon certain trusts; A. ought not to devise the estate, but ought to let it descend to his heir. If he devises it, his assets ought to bear the costs of the getting the legal estate out of his devisee. *Cooke v. Crawford*, 91

2. A. filed an original bill against B., and B. filed a cross bill against A. and others. They all moved that B. might give security for the costs of the cross suit. Motion refused. But leave was given to the co-defendants with A., who were not parties to the original suit, to move that B. might give security for the costs of the cross suit. *Sloggett v. Vian*, 187

3. A married lady filed a bill against her husband (who had become bankrupt) and his assignee, alleging that a sum of stock which had fallen into possession after the bankruptcy, was subject, under the circumstances stated in the bill, to the trusts of her settlement, and did not belong to the assignee. The assignee submitted the question to the court. The court decided that the fund was subject to the trusts of the settlement, and refused to give the assignee his costs, as he ought to have disclaimed. *Blythe v. Granville*, 190

4. In a suit for administering a testator's estate, a legacy was claimed by two legatees adversely to each other: Held, that, as the question arose on the testator's will, the costs must be borne by his estate, and not by the legacy. *Wilson v. Squire*, 212

See CONDITIONS OF SALE.

COVENANT.

1. A lease of mines contained a cove-

nant that, if the lessor should, *at any time before the expiration or determination of the lease*, give notice, in writing, to the lessee, of his desire to take all or any part of the machinery, stock in trade, implements, &c., in or about the mines, then the lessee would, at the expiration of the lease, deliver the articles specified in the notice to the lessor, on his paying the value of them, such value to be ascertained in the manner therein mentioned: Held, that the covenant was so injurious and oppressive to the lessee, that the court ought not to enforce it, or to grant an injunction to prevent a breach of it. *Talbot v. Ford*, 173

2. A., an owner of land in the township of S., entered into articles of agreement with B., the lessee of a neighboring colliery, by which he agreed to grant to B. a lease of part of the land for the purpose of forming a railway for the conveyance of coal to certain wharfs; and B., for himself, his executors, administrators and assigns, agreed with A., his heirs and assigns, to convey upon the railway, all the coal to be gotten from the colliery, or from any other lands or grounds in the township, and to pay to A., his heirs and assigns, two pence for every ton of coal so conveyed. B. assigned his interest in the colliery and in the lands taken, under the articles of agreement, for forming the railway, together with the use of the railway, to C.: Held, that the agreement to convey, upon the railway, all the coal, &c., and to pay two pence per ton in respect of it, ran with the land, and, consequently, that it was binding on C. *Hemingway v. Fernandes*, 228

3. Equity will interfere in the case of a breach of covenant, notwithstanding the covenantee might not have recovered damages for it at law. *Elliott v. Turner*, 477

4. Equity will not relieve against a breach of covenant, unless the payment of money will be an adequate compensation for it. *Ibid.*

See CONSTRUCTION, 11.

COVENANTS FOR TITLE.

1. Estates were devised to A. for life, remainder to B. for life, remainder to his sons successively in tail male. A. and B., during the infancy of B.'s eldest son, obtained an act of Parliament, vesting the estates in trustees in trust to sell: Held,

that A. and B. must covenant, with the purchaser, for the title. *In re London Bridge Act*, 176

2. If settled estates are sold under a power to sell them with the consent of the tenant for life, he must covenant for the title. *Ibid.*

CROSS CAUSE.

See COSTS, 2.

D

DEBENTURE CREDITORS.

1. The Deptford Pier Company, under the powers of their act of Parliament, issued debentures, by which they mortgaged their tolls to persons who had lent them money for the purposes of their undertaking. Two creditors of the company, who held no security on the tolls, recovered judgments in actions against the company (which were undefended) for the debts due to them. Whereupon the debenture creditors filed a bill against them and the company, alleging that they themselves had the first charge on the lands of the company, and that the plaintiffs in the action colluded with the directors of the company, and intended to sue out *elegits* and to take possession of the lands of the company; and praying for an injunction to restrain them from so doing, and for a receiver of the tolls. A demurrer to the bill, for want of equity, was allowed. *Perkins v. Deptford Pier Company*, 277

DEBT.

1. The corporation of Lichfield, constituted under the municipal corporation act, 5 and 6 Will. IV, c. 76, borrowed 200*l.* of M., to enable them to pay L., their then treasurer, sums which he had paid to creditors of the old corporation, and gave M. their promissory note for the 200*l.* They did not, however, pay over that sum to L., but suffered him to receive their then accruing income in reduction of what was due to him, and applied the 200*l.* to purposes to which the income would otherwise have been applicable: Held, that the corporation had no authority to give the promissory note, as it was not given to secure a debt due prior to the passing of the 5th and 6th Will. IV, c. 76. *The*

Attorney-General v. The Corporation of Eickfield, 547

See ASSETS.

DEBTOR AND CREDITOR.

DEBTOR AND CREDITOR.

On a *petition*, by a judgment creditor of a party to a suit, who had obtained a charging order on a fund in court, to which the party was entitled, the court refused to order the fund to be paid to the petitioner, without the party's consent. *Whitfield v. Prickett,* 259

DREED.

A marriage settlement, after reciting that it had been agreed that a cottage, &c., (which the husband held for the remainder of a term of 2,000 years) should be settled on the husband for life; and, after his decease, on the wife for life, by way of jointure, and, after their several deceases, on the issue of the marriage, and, in default of issue, on W. C. and his heirs, executors, &c., assigned the cottage to a trustee for the remainder of the term, in trust to permit the husband to receive the rents for so many years of the term as should expire in his lifetime; and, after his decease, in trust to permit the wife to receive the rents during her natural life, and, after their several deceases, to permit the heirs of the body of the husband, begotten on the body of the wife, to receive the rents for so many years of the term as should expire in the life or lives of him, her or them respectively, and, after the several deceases of the husband and wife, and, in default of issue of the body of the husband and wife as before limited, to permit W. C., his heirs, executors, &c., to receive the rents for all the residue of the term: Held, that under the first limitation, the term vested in the husband absolutely. *Bartlett v. Green,* 218

See HEIR AND EXECUTOR.

INTEREST.

JURISDICTION, 2.

DEFENDANT.

On the 5th December, 1839, an information relating to a free school, to which the master and usher were two of the defendants, was heard, but judgment was reserved. Shortly afterwards, the master and usher resigned, and a new master and usher were appointed. In November, 1840, judgment was pronounced, but the

decree was not drawn up. In March following, an original information in the nature of a supplemental one, was filed against the new master and usher, praying the same relief against them as was prayed by the former information, and as the informant would have been entitled to against their predecessors. In May following, the minutes of the decree on the prior information were finally settled; and, under an order, to which the new master and usher were not parties, the decree was dated the 5th of December, 1839. In January, 1842, the new master and usher put in their answer, stating new matter, in order to show that the relief prayed by the information against them, ought not to be granted: Held, that they were at liberty so to do; and, consequently, that their answer was not impertinent. *Attorney-General v. Foster,* 282

See COSTS, 3.

PLEADING, 1, 2.

PRACTICE, 2.

DELIVERY UP OF VOID INSTRUMENT.

See JURISDICTION, 2.

DEMURRER.

The plaintiff amended his bill after the defendant had answered it. The amendments changed the nature of the case: Held, that the defendant might demur to the amended bill, although he had answered that which was part of the formal groundwork both of the new and of the original case. *Cresy v. Beavan,* 354

See JURISDICTION, 2.

DEVISEE AND EXECUTOR.

The Common Council of London being empowered, by a local act of Parliament, to take a freehold house belonging to A. for the purposes of the act, at the expiration of six months after notice given of their intention to take the same, served A. with the required notice in September, 1840. The amount of the purchase money was afterwards agreed upon, and an abstract of A.'s title was sent to the common council. In April, 1841, he died, having by his will, dated in 1837, devised his real estate to B. and his residuary personal estate to C.: Held, that the purchase money (which, after A.'s death, was paid under the act) was to be considered not as part of his real, but as part of his

personal estate, and that, all his debts, &c., having been paid, it belonged to his residuary legatee. *Ex parte Hawkins*, 569

DISCHARGE

A. agreed that a legacy given to his wife should be set off against a sum of the same amount, which he owed to the testator on his promissory note; and he and his wife signed a receipt for the legacy; but it did not appear that the executors had delivered up the note to him. A. afterwards died, leaving his wife surviving: Held, that she was entitled to be paid the legacy, no release having been given for it by her husband. *Harrison v. Andrews*, 595

DISCOVERY.

See BILL OF DISCOVERY.

DISMISSAL

See NEW ORDERS.

DISSOLUTION OF PARTNERSHIP.

The affairs of a partnership being embarrassed, and daily growing worse, the court, on motion, appointed a person to sell the business and wind up the affairs of the partnership. *Bailey v. Ford*, 495

See JOINT STOCK COMPANY.

DOMICILE.

1. A British subject went to settle in France, in 1762, and afterwards purchased an estate, and became naturalized there. In 1791 he left France, and came to England, in consequence of the French Revolution, and, shortly afterwards, his property was confiscated by the revolutionary government. In January, 1802, he made a will in London, by which he left his property partly to a charity in Ireland, and partly to individuals resident in England, and appointed one of those individuals his executor. In April, 1802, emigrants were permitted to return to France, and, soon afterwards, he returned to that country. In 1804, he made a will in Paris, in which he stated that he was born at Waterford, and had come to France to obtain restitution of his estate; and, after referring to his former will, (which he had mislaid in London,) he recapitulated, very nearly, its contents, and concluded by expressly confirming it. He died in Paris,

in 1806, and his two testamentary papers were proved both in France and in England. Under the treaty of peace between England and France, in 1815, a large sum of French stock was set apart by the then French government, for the purpose of compensating British subjects whose property had been confiscated by the Revolutionary government, and part of that sum was awarded, by commissioners appointed by the British government, to the testator's executors, for the loss of the testator's property in France. The commissioners, under the powers of an act of Parliament, sold the stock so awarded, and paid the proceeds into the Court of Chancery: Held, that the testator was domiciled in France at his death, and that the fund in court was not subject to legacy duty. *The Commissioners of Charitable Donations and Bequests in Ireland v. Devereux*, 14

2. A native of Scotland died domiciled in Demerara, having personal property in Scotland, and having left legacies to persons in that country: Held, that the legacies were not liable to legacy duty. *Thompson v. The Advocate-General*, 153

DRAINING SETTLED ESTATES.

See CONSTRUCTION OF 3 & 4 VICT. c. 55.

E

ELDEST SON

See CONSTRUCTION, 2.

EVIDENCE.

See CONSTRUCTION, 1.

EXCEPTIONS.

An order for setting down exceptions to a report of insufficiency in an answer, if served after, though on the same day as an order to amend, and for defendant to answer the amendments and exceptions together, is irregular. *Zukela v. Ardouin*, 631

EXECUTOR.

If an executor in India collects part of the assets there, and then comes to England, and has the remainder remitted to him, by his agent, he is entitled to com-

mission on that part only which he collected in India. *Campbell v. Campbell*, 168

See WILFUL NEGLIGENCE OR DEFAULT.

EXECUTORY LIMITATION.

If a limitation is made dependent on the happening of either of two events, one of which is too remote, but the other is not; it will take effect if the latter event happens. *Miner v. Wraith*, 52

EXECUTORY WILL.

See CONSTRUCTION, 5, 6, 7, 8.
LEGACY, 9.

EXONERATION OF PERSONAL ESTATE.

Testator after giving an annuity to his wife, devised his real estates to trustees in trust to pay the annuity thereout, and gave his wife powers of distress and entry on his estates. He then devised his estates in strict settlement, subject, expressly, to the annuity and to the powers of distress and entry: Held, nevertheless, taking the whole of the will together, that the testator's personal estate was primarily to pay the annuity. *Roberts v. Roberts*, 336

F

"FAMILY."

See WILL, 18.

FINES AND RECOVERIES.

Where the tenant for life is a married woman, whose husband has been convicted of felony, the Court of Chancery is the protector of the settlement, though the life estate is not her separate property. *In re Waineuright*, 260

FOREIGN CONTRACT.

A settlement was made, in Ireland, of estates, some of which were situate there and the rest in England, by which the estates were limited to trustees for a term of years, for raising, at a future time, 10,000*l.* for portions; and interest 5*l.* per cent. was to be raised, out of the rents,

for the children's maintenance in the meantime; but the settlement was silent as to the rate of interest on the portions after they had become payable: Held, that the 10,000*l.* must be raised in Irish currency; but not with Irish interest, (6*l.* per cent.,) but 4*l.* per cent. according to the usual course of the court. *Young v. Lord Waterpark*, 199

FUND IN COURT.

The court will not order money into court if the title of the party applying is at all doubtful. Neither will it order a fund standing to the credit of a cause between A. and B. to be transferred to the joint credit of that and another cause, in which it is claimed by C., adversely to both A. and B., unless C. has a perfectly clear title to the fund. *St. Victor v. Devereux*, 641

See CHARGING ORDER.

FUTURE PROPERTY OF WIFE.

See CONSTRUCTION, 11.

G

GAMING.

Securities given by the plaintiff, to prevent a prosecution for cheating at cards, decreed to be delivered up. *Osbaldiston v. Simpson and others*, 513

GUARDIAN.

The court will refer it to the master, to approve of a guardian for an infant, notwithstanding the infant, being fourteen years of age and entitled to real estate, has, by deed, appointed a guardian for himself. *Coham v. Coham*, 639

See INFANT, 4, 5.

H

HARD BARGAIN.

See COVENANT, 1.

HEIR AND DEVISEE.

Testator devised all his freehold estates to his most dutiful and respectful nephew

E. E., "upon the trusts and for the uses following;" but did not declare any use or trust except as to one of his estates: Held, from the context of the will and a codicil thereto, that there was no resulting trust in favor of his son and heir, as to any part of his estates. *Hughes v. Evans*, 496

HEIR AND EXECUTOR.

A., being seised in fee of lands, under which were coal, iron, &c., and the surface of which was in the occupation of a tenant, executed a deed by which he sold and disposed of and granted and conveyed the mines under the land to B., for ninety-nine years, subject to the payment to A., his executors, administrators and assigns, of 7,998*l.*, by twelve yearly instalments, which were secured by powers of distress and entry reserved to him, his executors, administrators and assigns; and the latter power provided that, upon an entry being made, the grant and conveyance and the term thereby granted, and everything contained in the deed, on the part of A., his heirs, executors or administrators, should cease, and that A., his heirs, executors, &c., should not be accountable to B. for any of the instalments or sums of money which B. should have then paid in part of the purchase money for the minerals. The subsequent part of the deed contained a covenant enabling B., at the end of the tenant's term, to enter upon the surface lands and to hold them for ninety-nine years, under the yearly rent of 110*l.*, which, as well as the power of distress by which it was secured, was reserved to A., his heirs and assigns: Held, that the instalments payable for the mines were not rent, and, therefore, not incident to the reversion, but personal debts due from B. to A. *Lord Hatherton v. Bradburne*, 599

See EXONERATION OF PERSONAL ESTATE.

HUSBAND AND WIFE.

1. By articles entered into on the marriage of a female infant, she and her intended husband agreed to assign, on her attaining twenty-one, a share of her deceased grandfather's residuary estate to which she was entitled under the trusts of his will, to trustees, in trust for themselves and their children; and, after the lady had attained twenty-one, a settlement was made in pursuance of the articles; but before the settled property was transferred

to the trustees, the husband died: Held, that the wife's right to the property by survivorship, was not barred. *Ellison v. Elwin*, 309

2. A married woman, having a life interest in a fund, was living with and was maintained by her husband, but out of her own income, and in a manner very inadequate to it; and he was in very embarrassed circumstances, and had no means of support except his wife's income. The court nevertheless refused to order a portion of it to be settled to her separate use. *Vaughan v. Buck*, 404

3. A married lady became entitled to an estate for her separate use, under her grandfather's will, and she and her husband joined in appointing a person to receive the rents, as their agent; who, by the husband's direction, paid them to an account opened by him with H. & Co., the bankers of his wife's family; and he drew checks on H. & Co. for sums, some of which he applied for his own purposes, and the rest to keep down the interest of incumbrances on the estate. At the husband's death a large balance remained in the hands of H. & Co., which they transferred to the account of his executors; and his wife, who was his sole executrix, drew on H. & Co. in that character, and died about ten months after her husband: Held, that the balance belonged not to her, but to her husband's estate. *Borlford v. The Archbishop of Armagh*, 643

See CONSTRUCTION, 11.
TITLE.

I

IMPERTINENCE.

Before answer to a bill for specific performance, the plaintiff obtained an order of reference as to title. The defendant, under a threat of attachment, put in his answer, in which he alleged that one of the conditions of sale was framed with a fraudulent intent: Held, that that allegation was not impertinent. *Emery v. Pickering*, 583

See DEFENDANT.

INCUMBRANCES.

See ANNUITY
PRIORITY OF INCUMBRANCES.

INDIAN EXECUTOR.

See COMMISSION.

INFANT.

1. Under a will, an infant was entitled to maintenance out of the income of property which was devised to him, provided he attained twenty-one; and 100*l.* a year was allowed by the master for that purpose; but the income of the property was scarcely sufficient to pay certain annuities and other prior charges thereon. Under those circumstances it was ordered that the trustees and executors should be at liberty, out of any funds in their hands, to pay the 100*l.* a year; and, if the same should be insufficient, that what the guardian should pay for the infant's maintenance, should form a charge upon his interest in the property. *Fentiman v. Fentiman*, 171

2. Two suits having been instituted on behalf of the same infant plaintiffs, it was referred to the master, to inquire and state whether the bills were for the same matters, and, if so, which of the suits it would be most for the benefit of the infants to prosecute; but the order did not give the master liberty to state special circumstances. The master reported that the two bills were, *substantially*, for the same matters, and that it would be most for the benefit of the infants to prosecute the first suit; but that, as the same person was solicitor both for the next friend and for the defendants in that suit, he was of opinion that some other solicitor should be appointed for the plaintiffs, and that part of the funds in the cause, which were then in a country bank, should be brought into court: Held, that the master had given a *qualified* answer to the question referred to him, and added suggestions which he was not at liberty to make; and, therefore, it was referred back to him to review his report. *Ganderton v. Ganderton*, 182

3. The solicitor employed by the next friend, in an infant's suit, having given a notice of motion on behalf of the plaintiffs, one of the plaintiffs who had come of age, but had not disavowed the suit or obtained an order to change his solicitor, employed another solicitor to oppose the motion on his behalf: Held, that the counsel instructed by that solicitor, were not entitled to be heard. *Swift v. Grazebrook*, 185

4. Order made, on petition without suit, for a reference to approve of a guardian and maintenance for an infant, having 150*l.* a year arising from land. *Ex parte Angell*, 258

5. Guardian *ad litem*, appointed to infants, under special circumstances, without a commission or their appearing in court. *Stillwell v. Blair*, 399

6. A *habeas corpus* issued to bring up the body of a ward of court who had been taken in execution in an action by a tradesman, for necessities, and the tradesman was ordered to attend at the bar of the court at the same time. *Bond v. Roberts*, 400

7. The court will refer it to the master to approve of a guardian for an infant, notwithstanding the infant, being fourteen years of age and entitled to real estate, has, by deed, appointed a guardian for himself. *Coham v. Coham*, 639

See MAINTENANCE, 2.

INJUNCTION.

1. A plaintiff who has obtained the common injunction, cannot sustain it on grounds contained in the answer, but not stated in his bill. *Cresy v. Beavan*, 99

2. It is a breach of an injunction to stay trial, to obtain an order to change the venue in the action. *Pariente v. Ben-susan*, 522

3. A judgment creditor, who had obtained possession of his debtor's estates under an *elegit*, filed a bill after the debtor's death, against his devisee, claiming to have a charge on the estates, under 1 and 2 Vict. c. 110, and praying to have the debt raised and paid out of the estates. The defendant, in her answer, claimed the estates, not as devisee, but under a conveyance executed by the debtor in his lifetime. The plaintiff, instead of amending his bill, filed a supplemental bill against the defendant, praying that the conveyance might be declared to be fraudulent and void, as against him, and also that an ejectment to recover possession of the estates, which the defendant had brought shortly before she put in her answer to the original bill, might be stayed. The answer to the *supplemental bill* admitted, in effect, that the conveyance was voluntary. The court, however, held that, as that admission was

made in the answer to the supplemental bill, it was not sufficient to sustain the injunction. *Parker v. Constable*, 536

4. The grantor of an annuity had admitted, in his answer to a bill in Chancery, that the annuity was a subsisting charge on his estates, and the decree and proceedings in the suit had treated the annuity as valid. Under those circumstances, the grantor's devisee was restrained from proceeding at law, to set aside the annuity for want of a memorial. *Roberts v. Madocks*, 549

See JURISDICTION, 1, 2.
SPECIFIC PERFORMANCE

INTEREST.

Under an enclosure act, an allotment had been made to the impropiator, in lieu of tithes; and, by the act, the tithes were to cease on the allotment being made; but the act did not authorize the sale of allotments before the execution of the award. In the interim, the impropiator agreed to sell his allotment for 700*l.*, to be paid on the 25th of March then next, on a good and valid title being made and executed. The award was not made until several years after the agreement; but the purchaser had been, all along, in possession of the allotment. The court ordered him to pay four per cent. interest on his purchase money from the 25th of March next, after the date of agreement, although a good title could not be made until the award was executed. *Attorney-General v. Christ Church*, 214

See FOREIGN CONTRACT.

ISSUE.

See WILL, 2.

ISSUE IN TAIL MALE.

See WILL, 5

J

JOINT STOCK COMPANY.

A. gave a bond to the public officer of a joint stock banking company, (in which he afterwards became a shareholder,) to secure advances made to him by the company. The bank afterwards suspended

their business, and brought an action on the bond in the name of the officer. A. then filed a bill, on behalf of himself alone, against the officer and the directors of the company, praying for an account of the dealings and transactions of the company down to the time when their business ceased, that his share of the capital and profits might be ascertained and set off against the money due on the bond, and that the surplus might be paid to him: Held, that the bill prayed, in effect, for a dissolution of the company, and, therefore, that all the shareholders ought to have been made parties to it. *Abraham v. Hannay*, 581

JOINTURE.

Testator directed a settlement to be made of his estates, and a power to be inserted in it, enabling the tenant for life to jointure any wife or wives, at one or several times, to the extent of one-fifth part of the then ordinary annual rental of the estates: Held, that the settlement ought to authorize the tenant for life to charge the estates with a clear yearly rent charge, not exceeding one-fifth of the yearly rent of the estates payable at the time of creating the charge. *Trevor v. Trevor*, 108

JURISDICTION.

1. Bill by a *cestui que trust*, against the assignees of the trustee who had become bankrupt, for an account and payment of what was due in respect of a breach of trust committed by the bankrupt, and to restrain the assignees from distributing his estate amongst his creditors. The court refused the injunction; because it had no jurisdiction to interfere with the administration of a bankrupt's estate at the suit of a person claiming as a general creditor. The Court of Bankruptcy has exclusive jurisdiction to deal with what is admitted to be the bankrupt's estate: but a court of equity or a court of law (as the case may be) has jurisdiction to determine what is or is not the property of the bankrupt. *Halford v. Gilson*, 44

2. The plaintiff cohabited with M. S., a married woman; and, in consideration of her agreeing to continue to cohabit with him, he executed a deed, whereby, "for the consideration therein mentioned," he granted, to a trustee for her, an annuity, to commence on his death, marriage, or withdrawing his protection from her; and

covenanted to charge any land that he should become possessed of, with the annuity; and, for further securing the annuity, he executed a bond, in the penalty of 1,000*l.*, to the trustee, and gave a warrant of attorney to enter up judgment against him on the bond; and judgment was entered up against him, at the suit of the trustee, for 1,000*l.* and costs. Some years afterwards, the plaintiff married; previously to which he had put an end to his intercourse with M. S.; and, having been advised that the annuity deed and collateral securities, which he stated to have been obtained from him for the consideration of future cohabitation, were not binding upon him, he refused to pay the annuity. In consequence of which, M. S., in the trustee's name, brought an action against him on the judgment. The bill prayed the annuity deed and collateral securities might be declared void, and be delivered up to be cancelled, and that the trustee might enter up satisfaction on the judgment, and that the action might be stayed. The trustee put in a general demurrer, which was allowed. *Smyth v. Griffin*, 245

See CHARGING ORDER.

L

LAPSE.

See LEGACY, 1.

LEASE.

A., being seised in fee of lands, under which were coal, iron, &c., and the surface of which was in the occupation of a tenant, executed a deed by which he sold and disposed of and granted and conveyed the mines under the land to B., for ninety-nine years, subject to the payment to A., his executors, administrators and assigns, of 7,998*l.*, by twelve yearly instalments, which were secured by powers of distress and entry reserved to him, his executors, administrators and assigns; and the latter power provided that, upon an entry being made, the grant and conveyance, and the term thereby granted, and everything contained in the deed on the part of A., his heirs, executors or administrators, should cease, and that A., his heirs, executors, &c., should not be accountable to B. for any of the instalments or sums of money which B. should have then paid in part of the purchase money for the minerals. The subsequent part of the deed contained a covenant enabling B., at the

end of the tenant's term, to enter upon the surface lands, and to hold them for ninety-nine years, under the yearly rent of 110*l.*, which, as well as the power of distress by which it was secured, was reserved to A., his heirs and assigns: Held, that the instalments payable for the mines were not rent, and, therefore, not incident to the reversion, but personal debts due from B. to A. *Lord Hatherton v. Bradburne*, 599

LEGACY.

1. Testator gave to T. R. 15,000*l.*, to be by him applied for the use of Roman Catholic priests, in and near London, at his absolute discretion. T. R. died in the testator's lifetime: Held, that the legacy was not void for uncertainty, and did not lapse by T. R.'s death in the testators' lifetime, but was good as a charitable legacy; and that it must be applied for the benefit of persons filling the character of Roman Catholic priests in and near London, at the testator's death, and afterwards, according to a scheme to be approved by the master. *The Attorney-General v. Gladstone*, 7

2. Testator directed the rents of his estates to be accumulated for five years; "at the end of which time I leave as follows: to H. G. 200*l.*; and to W. B., W. C., E. M. or as many as are living, 100*l.* each; and to M. N., S. H., S. S., or as many as are then living, 50*l.* each; and the same sum to be given at the expiration of ten years from the time of my death, and ditto at the end of fifteen and twenty years from my death." Two of the legatees died between the end of the tenth and the fifteenth year after the testator's death, having received the payments which became due to them at the end of the fifth and tenth years: Held, that the rights of the legatees named in the will, to receive the payments, were contingent on their surviving the times of payment, and, consequently, that the executors of the then deceased legatees could not claim any payment at the end of the fifteenth year. *Bruce v. Charlton*, 65

3. In a suit for administering a testator's estate, a legacy was claimed by two legatees adversely to each other: Held, that, as the question arose on the testator's will, the costs must be borne by his estate, and not by the legacy. *Wilson v. Squire*, 212

4. Testator drew two checks, on his

banker, in favor of two of his servants, and delivered them to the servants, with directions to present them after his death. About a year afterwards, he made a testamentary instrument, by which, after giving legacies to different persons, and an annuity to each of the two servants, he bequeathed the residue of his personal estate to A. B., and *revoked any former will or codicil* by him made, and declared that instrument to be his last will. The three paper writings were admitted to probate, as constituting together the testator's last will: Held that, though the Court of Chancery was bound to consider the amounts of the checks as legacies, yet that they were revoked by the subsequent instrument. *Walsh v. Gladstone*, 261

5. Testator gave to the children of his daughter, a legacy of 2,000*l.*, to be paid and payable from and out of his manors, messuages, &c., and he subjected and charged the same to and with the payment thereof accordingly: Held, that the legacy was payable out of the testator's real estates only. Testator, after giving an annuity to his wife, devised his real estates to trustees in trust to pay the annuity thereout, and gave his wife powers of distress and entry on his estates. He then devised his estates in strict settlement, subject, expressly, to the annuity and to the powers of distress and entry: Held, nevertheless, taking the whole of the will together, that the testator's personal estate was primarily liable to pay the annuity. *Roberts v. Roberts*, 336

6. Testator directed his trustees to pay the interest of 2,500*l.* to his daughter for life, for her separate use, and, after her death, for the maintenance of all her children, until they should attain twenty-one, and then the principal to be equally divided amongst her said children; and, if his daughter should die without leaving a child, then that the principal should be divided amongst all his own children then living. The daughter had children, but they all died under twenty-one: Held, nevertheless, that the legacy vested in them. *Parker v. Golding*, 418

7. A legacy of 10,000*l.* consols, "now standing in my name," held, from the context of the will, not to be specific. *Author v. Author*, 422

8. Testator bequeathed a general legacy of 10,000*l.* consols to A. B. There was no deficiency of assets, but, owing to the institution of a suit for the administration

of the testator's estate, the legacy remained unsatisfied for several years after the testator's death, during which consols rose: Held, nevertheless, that A. B. was entitled to have the full amount of his legacy purchased and transferred to him. *Author v. Author*, 439

9. Testator bequeathed to his daughter Elizabeth 2,000*l.* for life, the principal to be equally divided among her children, *should they have attained twenty-one*: and, to the two children of his late daughter Jemima, 1,000*l.* each, *to be paid on their attaining twenty-one*: Held, that the legacies to the children were contingent on their attaining twenty-one, and that they were not entitled to interest in the meantime. Testator left to his daughter Jane the sum of 2,000*l.*, *to be settled on her* when she married, or to be paid to her on her attaining twenty-one: should she die not leaving issue, the 2,000*l.* to fall into the residue of his estate. Jane married in her father's lifetime. The court directed the legacy to be settled in trust for her separate use for life; remainder for her children living at her death, according to her appointment; in default of appointment, for her sons at twenty-one, and her daughters at that age or on marriage; remainder for her next of kin; and, if she had no child living at her death, the legacy to become part of the testator's residue. *Young v. Macintosh*, 445

10. Testator bequeathed the portraits of himself, of his grandfather and grandmother, of his mother and of the Duke of Schomberg, to A. B. The testator had one portrait of himself, one of his grandfather and grandmother, and one of his mother, and a three-quarters portrait and a portrait in crayons of the Duke of Schomberg, and also a picture in which the duke was represented on horseback, with a battle in the distance: Held, that that picture was a portrait of the duke, and that it passed, together with all the other portraits, by the bequest. *The Duke of Leeds v. Lord Amherst*, 459

11. A. agreed that a legacy given to his wife, should be set off against a sum of the same amount, which he owed, to the testator, on his promissory note; and he and his wife, signed a receipt for the legacy; but it did not appear that the executors had delivered up the note. Held that, for want of a release, the surviving wife was not barred. *Harrison v. Andrews*, 595

See ASSSETS.

CONSTRUCTION, 4, 9.
WILL, 3, 4, 14, 17.

LEGACY DUTY.

1. A British subject went to settle in France, in 1762, and afterwards purchased an estate, and became naturalized there. In 1791, he left France, and came to England, in consequence of the French Revolution, and, shortly afterwards, his property was confiscated by the revolutionary government. In January, 1802, he made a will in London, by which he left his property partly to a charity in Ireland, and partly to individuals resident in England, and appointed one of those individuals his executor. In April, 1802, emigrants were permitted to return to France, and, soon afterwards, he returned to that country. In 1804, he made a will, in Paris, in which he stated that he was born at Waterford, and had come to France to obtain restitution of his estate; and, after referring to his former will, (which he had mislaid in London,) he recapitulated, very nearly, its contents, and concluded by expressly confirming it. He died in Paris, in 1806, and his two testamentary papers were proved both in France and in England. Under the treaty of peace between England and France in 1815, a large sum of French stock was set apart by the then French government, for the purpose of compensating British subjects whose property had been confiscated by the revolutionary government, and part of that sum was awarded, by commissioners appointed by the British government, to the testator's executors, for the loss of the testator's property in France. The commissioners, under the powers of an act of Parliament, sold the stock so awarded, and paid the proceeds into the Court of Chancery. Held that the testator was domiciled in France at his death, and that the fund in court was not subject to legacy duty. *The Commissioners of Charitable Donations and Bequests in Ireland v. Devereux*, 14

2. Testator gave his residuary estate (which amounted to 13,000*l.*) to his executors, to be by them appropriated to the education of the children of the poor in Ireland, principally those in or about Limerick: Held, that legacy duty was payable on the residue. *The Attorney-General v. Fitzgerald*, 83

3. A native of Scotland died domiciled in Demerara, having personal property in Scotland, and having left legacies to per-

sons in that country: Held, that the legacies were not liable to legacy duty. *Thompson v. The Advocate-General*, 153

LENGTH OF TIME.

See STATUTE OF LIMITATIONS.
TITLE.

LESSOR AND ASSIGNEE.

A., an owner of land in the township of S., entered into articles of agreement with B., the lessee of a neighboring colliery, by which he agreed to grant to B. a lease of part of the land for the purpose of forming a railway for the conveyance of coal to certain wharfs; and B., for himself, his executors, administrators and assigns, agreed with A., his heirs and assigns, to convey upon the railway, all the coal to be gotten from the colliery, or from any other lands or grounds in the township, and to pay to A., his heirs and assigns, two pence for every ton of coal so conveyed. B. assigned his interest in the colliery and in the lands taken, under the articles of agreement, for forming the railway, together with the use of the railway, to C.: Held, that the agreement to convey, upon the railway, all the coal, &c., and to pay two pence per ton in respect of it, ran with the land, and, consequently, that it was binding on C. *Hemingway v. Fernandes*, 228

LESSOR AND LESSEE.

See COVENANT.

LIEN.

A. agreed to sell an estate to B. for an annuity, and B. was to pay off a mortgage to which the estate was subject. Accordingly B. executed a deed, by which he granted the annuity to A. and covenanted to pay it; and, by a conveyance of even date, but executed after the annuity deed, after reciting the agreement and the annuity deed, A. and the mortgagee, in pursuance of the agreement, and in consideration of the annuity having been so granted as aforesaid, and of the payment of the mortgage money, conveyed the estate to B. The annuity afterwards became in arrear: Held, that A. had no lien on the estate for the annuity. *Buckland v. Pocknell*, 406

LUNATIC.

See COMMISSION OF LUNACY.

M

MAINTENANCE.

1. Under a will, an infant was entitled to maintenance out of the income of property which was devised to him provided he attained twenty-one: and 100*l*. a year was allowed by the master, for that purpose: but the income of the property was scarcely sufficient to pay certain annuities and other prior charges thereon. Under those circumstances it was ordered that the trustees and executors should be at liberty, out of any funds in their hands, to pay the 100*l*. a year, and, if the same should be insufficient, that what the guardians should pay for the infant's maintenance, should form a charge upon his interest in the property. *Fentiman v. Fentiman*, 171

2. Testator gave an annuity to a trustee, in trust to pay the same to his daughter for her separate use for life, remainder to her husband to enable him to maintain his children by her, until the youngest attained twenty-one; and, if the husband should die before the youngest child attained twenty-one, then upon trust for the trustee to apply the annuity in like manner as the husband was directed to do. Held (the daughter being dead) that the husband was bound to apply the annuity for the maintenance of the children; but that, if he maintained them properly, they would not be entitled to an account against him. *Leach v. Leach*, 304

See PRACTICE, 6.

MARRIAGE SETTLEMENT.

1. By a marriage settlement, 1,500*l*. and 2,700*l*. stock, of which the lady was possessed, were settled in trust for her separate use for life, remainder in trust for her intended husband for life, and after his death, as the wife should appoint by will: and the intended husband covenanted that, if the marriage should take effect, he would, as often as occasion should require, join with his wife, in doing all necessary acts for assigning to the trustees all the property to which his wife should become entitled during the coverture, upon the trusts declared of the 1,500*l*. and 2,700*l*. stock. At the date of the settlement, the wife had an absolute

vested interest in 1,935*l*. stock, expectant on her father's death, but it was not mentioned in the settlement. During the marriage, the husband became bankrupt, and then the wife's father died: Held, that the 1,935*l*. stock did not belong to the husband's assignee as part of his estate, but was bound by his covenant, as being property to which the wife would become entitled during the coverture. *Elythe v. Granville*, 190

2. A marriage settlement, after reciting that it had been agreed that a cottage, &c., (which the husband held for the remainder of a term of 2,000 years,) should be settled on the husband for life, and, after his decease, on the wife for life, by way of jointure, and, after their several deceases, on the issue of the marriage, and, in default of issue, on W. C. and his heirs, executors, &c., assigned the cottage to a trustee, for the remainder of the term, in trust to permit the husband to receive the rents for so many years of the term as should expire in his lifetime, and, after his decease, in trust to permit the wife to receive the rents during her natural life, and, after their several deceases, to permit the heirs of the body of the husband begotten on the body of the wife to receive the rents, for so many years of the term as should expire in the life or lives of him, her or them respectively, and, after the several deceases of the husband and wife, and in default of issue of the body of the husband and wife as before limited, to permit W. C., his heirs, executors, &c., to receive the rents for all the residue of the term. Held that the term vested in the husband absolutely under the first limitation. *Bartlett v. Green*, 219

MISDEMEANOR.

See COMPOUNDING MISDEMEANOR

MISTAKE.

An erroneous statement was made to a life insurance company, by their agent, as to A.'s interest in his son's life; upon which the company granted a policy to A. After the son's death, the company discovered the error and refused to pay the sum insured. A bill filed by A., to have the mistake rectified, was dismissed, because the evidence did not show, distinctly, whether the mistake arose from the agent's inadvertence, or from his having been misinformed by A. *Parsons v. Bignold*, 513

MORTGAGOR AND MORTGAGEE.

A. mortgaged an estate to B. for 1,000 years. B. died, having bequeathed the mortgage to his widow. She also died; and, in 1822, her personal representatives entered into and continued in possession of the estate until 1838, when they sold and assigned the mortgage to C., who entered and continued in possession until 1843, when A.'s heir filed a bill to redeem, on the ground that the deed of assignment recited the mortgage and conveyed the term to C., subject, expressly, to the equity of redemption of A. or his legal representatives: Held, that the deed was not such an acknowledgment of the mortgagor's title as to make the estate redeemable. *Lucas v. Denison*, 584

MORTGAGEE AND SURETY.

A. made a mortgage to B., and, by the same deed, A. and C., his sureties, covenanted for payment of the mortgage money. B. recovered the amount from C., previously to which he lent a further sum to A., and took a further charge for it on the mortgaged property: Held, that C. could not compel B. to assign the mortgage to him unless he paid off the further sum. *Williams v. Owen*, 597

MUNICIPAL CORPORATION.

The corporation of Lichfield, constituted under the municipal corporation act, 5 and 6 Will. IV, c. 76, borrowed 200*l*. of M., to enable them to pay L., their then treasurer, sums which he had paid to creditors of the old corporation, and gave M. their promissory note for the 200*l*. They did not, however, pay over that sum to L., but suffered him to receive their then accruing income in reduction of what was due to him, and applied the 200*l*. to purposes to which the income would otherwise have been applicable: Held, that the corporation had no authority to give the promissory note, as it was not given to secure a debt due prior to the passing of the 5th and 6th Will. IV, c. 76. *The Attorney-General v. The Corporation of Lichfield*, 547.

N

NAME AND ARMS.

See CONSTRUCTION 8.

NE EXEAT REGNO.

A writ of *ne exeat* granted, though not prayed for by the bill. *Barned v. Laing*, 255

NEAREST OF BLOOD.

The master was directed to inquire who were the nearest in blood of a testator *ex parte paterna*, at a certain period: Held that "nearest of blood" and "next of kin" were synonymous terms, and, as the suit related to personal estate, that the master ought to follow the civil and not the canon law mode of computation in prosecuting the inquiry. *Cooper v. Denton*, 290

NEAREST OF KIN.

Testator bequeathed his residue to his wife for life, remainder to his daughter absolutely; but if his wife survived his daughter, then, at his wife's death, one-third of the capital was to go according to her will, and the other two-thirds were to go and be paid; "to my *other* the next of kin of my paternal line." The daughter was the testator's sole next of kin at his death; and exclusive of her, the testator's brothers were his next of kin at the same time. At the death of the widow, (who survived the daughter,) the daughter's children were the testator's next of kin, according to the statute, but they and the testator's brothers were his *nearest* of kin, all of them being his relations in the second degree: Held, that the brothers, as well as the children, were entitled to the two-thirds of the residue. *Cooper v. Denton*, 290

See CONSTRUCTION, 21.

NEXT OF KIN.

NEGLECT OR DEFAULT.

See WILFUL NEGLECT OR DEFAULT.

NEW ORDERS.

1. A subpoena served, under the foreign process act, on a defendant resident abroad, is duly served within the 8th general order of August, 1841; and, if he does not appear, the plaintiff may cause an appearance to be entered for him, and proceed to take the bill *pro confesso*. *Flight v. Camac*, 32

2. The court may permit a cause to be

set down for argument on an objection for want of parties, after the fourteen days allowed for that purpose by the 39th order of August, 1841, have expired. *Cockburn v. Tolson*, 188

3. The discretion given to the court, by the 41st order of August, 1841, as to the costs of a cross bill of discovery, cannot be exercised before the hearing of the original suit, although the plaintiff in it dismisses his bill immediately after putting in his answer to the cross bill. *Skipworth v. Westfield*, 265

4. An appearance cannot be entered for a defendant to an amended bill, under the 29th order of May, 1845, where the subpoena has been served upon his solicitor. *The Marquis of Hertford v. Suisse*, 489

5. Where the subpoena to appear and answer had been served in August, 1845, the court refused to allow an appearance to be entered under the 29th order of May, 1845, on a motion without notice. *Walker v. Hurst*, 490

6. Memorandum of serving copy bill, allowed to be entered after the orders of May, 1845, were in operation, although the service would have been bad, if made after those orders took effect. *Feltham v. Clarke*, 491

7. Replication filed in July, 1845; in November following defendant moved to dismiss. After notice served, but before motion made, plaintiff filed subpoena to rejoin: Held that, though the replication was filed before the new orders of May, 1845, took effect, the filing of the subpoena to rejoin was a nullity, under the 93d of those orders; but the court refused to grant the motion; and ordered a fresh replication to be filed without delay. *Lovell v. Blew*, 492

8. Replication was filed before the orders of May, 1845, took effect. No proceeding having been taken within three terms after replication filed, the defendant moved to dismiss according to the old practice. The new orders of May, 1845, having come into operation in the meantime, the court ordered the plaintiff to file a fresh replication. *Routledge v. Gibson*, 493

9. The undertaking to speed is abolished by the new orders of May, 1845. *Ibid.*

10. Held, on a motion for leave to enter a memorandum of service of copy

bill, that it is not necessary for plaintiff to swear that he examined the copy either with the office copy or the record. An affidavit that he believes it to be a true copy is sufficient. *Leph v. Leph*, 590

See PLEADING, 4, 5.

NEXT OF KIN.

1. The master was directed to inquire who were the nearest in blood of a testator *ex parte paterna*, at a certain period. Held that "nearest of blood" and "next of kin" were synonymous terms, and, as the suit related to personal estate, that the master ought to follow the civil and not the canon law mode of computation in prosecuting the inquiry. *Cooper v. Denison*, 290

2. Testator bequeathed his residue to his wife for life, remainder to his daughter absolutely; but if his wife survived his daughter, then, at his wife's death, one-third of the capital was to go according to her will, and the other two-thirds were to go and be paid: "to my other the next of kin of my paternal line." The daughter was the testator's sole next of kin at his death; and, exclusive of her, the testator's brothers were his next of kin at the same time. At the death of the widow (who survived the daughter,) the daughter's children were the testator's next of kin according to the statute, but they and the testator's brothers were his nearest of kin, all of them being his relations in the second degree. Held that the brothers, as well as the children, were entitled to the two-thirds of the residue. *Ibid.*

See CONSTRUCTION, 3.
NEAREST OF KIN.
PARTIES, 1.

NOTICE.

See ORDER AND DISPOSITION, 1, 2.

○

ORDER AND DISPOSITION.

1. Actual notice of the assignment of a policy effected with the Equitable Assurance Society, is necessary to take the policy out of the order and disposition of the assured. *Duncan v. Chamberlayne*, reported *ante*, Vol. XI, p. 123, overruled. *Thompson v. Speirs*, 469

2. Notwithstanding a policy of insurance may have been effected with a mutual insurance company, *express* notice of a deposit of it, by way of equitable mortgage, must be given to the company, in order to take it out of the order and disposition of the depositor. *Ex parte Wilkinson*, 475

ORDER FOR PAYMENT OF MONEY.

See ASSIGNMENT.

FUND IN COURT.

PAYMENT OF MONEY OUT OF COURT.

ORIGINAL BILL IN THE NATURE OF A SUPPLEMENTAL BILL.

See PLEADING, 1.

P

PARENT AND CHILD.

1. Testator gave an annuity to a trustee, in trust to pay the same to his daughter for her separate use for life, remainder to her husband to enable him to maintain his children by her, until the youngest attained 21; and, if the husband should die before the youngest child attained 21, then upon trust for the trustee to apply the annuity in like manner as the husband was directed to do. Held, (the daughter being dead) that the husband was bound to apply the annuity for the maintenance of the children; but that, if he maintained them properly, they would not be entitled to an account against him. *Leach v. Leach*, 304

PARTIES.

1. The 30th general order of August, 1841, applies to those cases only in which trustees have a present, absolute power to sell real estate: and the 32d order does not apply to a case in which there is only one principal and one surety. *Lloyd v. Smith*, 457

2. If a person entitled to an annuity, payable out of the testator's personal estate and the proceeds of the sale of his real estate, files a bill for the administration of the whole of the testator's property, all the other annuitants and legatees must be made parties, notwithstanding the receipts of the trustees are made sufficient discharges. *Miller v. Huddleston*, 467

3. Some of the plaintiffs, who had an equitable interest only in the property in question, mortgaged their interests pending the suit: Held, at the hearing, that the mortgagee was a necessary party. *Solomon v. Solomon*, 516

4. If, in an administration suit instituted by the next of kin of a testator at his death, the question is whether the testator, by the words "my next of kin," meant his next of kin at his death or at a future period, not only the executor, but also the person or persons who may, by possibility, be the next of kin at that period, ought to be made defendants. *Urquhart v. Urquhart*, 613

5. The court will not decree a general account and administration of assets, in a suit in which the deceased is represented by an administrator *ad litem* merely. *Croft v. Waterton*, 653

See PARTNERSHIP, 2.

PARTNERSHIP.

1. The affairs of a partnership being embarrassed, and daily growing worse, the court, on motion, appointed a person to sell the business and wind up the affairs of the partnership. *Bailey v. Ford*, 495

2. A. gave a bond to the public officer of a joint stock banking company, (in which he afterwards became a shareholder,) to secure advances made to him by the company. The bank afterwards suspended their business, and brought an action, on the bond, in the name of the officer. A. then filed a bill, on behalf of himself alone, against the officer and the directors of the company, praying for an account of the dealings and transactions of the company down to the time when their business ceased, that his share of the capital and profits might be ascertained and set off against the money due on the bond, and that the surplus might be paid to him. Held that the bill prayed, in effect, for a dissolution of the company, and, therefore, that all the shareholders ought to have been made parties to it. *Abraham v. Hannay*, 581

See PRODUCTION OF DOCUMENTS, 1.

"PAYABLE" CONSTRUED "VESTED."

See WILL, 17.

PAYMENT OF MONEY OUT OF AND INTO COURT.

A, B. & C., being entitled to a sum of money in the bank, petitioned that it might be paid, not to themselves, but to their banker. An order was made according to the prayer. *In the Matter of the Warwick and Leamington Railway Company*, 31

See PRACTICE, 26.

PERPETUITY.

1. Testator devised his real estates to trustees in fee, in trust for T. M. for life, with remainder in trust for all the children of T. M., as tenants in common in tail, with remainders over, and, ultimately, in trust for his own right heirs: and he bequeathed his personal estate to the trustees, in trust for Mary B. for life, with remainder in trust for all her children who should attain twenty-one, with remainders in like manner: and he directed that the timber or wood which should be upon his real estates, should be, from time to time, made use of for repairing the houses thereon, or otherwise for the benefit and advantage of his estates; or that the same should be sold, and the proceeds applied in the manner in which his personal estate was thereinbefore directed to be applied: Held, that the direction or trust respecting the timber and wood on the estates, was not perpetual, but ceased on the inheritance vesting, in possession, in adult persons. *Sylvester v. Bradley*, 75

2. A. had power to appoint a fund amongst all the children of B., *begotten and to be begotten, and their issue*, and, in default of appointment, the fund was given to the children equally. B. had only six children, all of whom were living when the power was created. A. directed by his will that *the share which every child of B. begotten or to be begotten*, was entitled to in default of appointment, should be held in trust for that child for life, and, after its death, *for its children*: Held, that the appointment was not void for remoteness. *Griffith v. Pownall*, 393

See REMOTENESS.

PERSONAL REPRESENTATIVES.

See WILL, 2.

PLAINTIFF.

A plaintiff who has obtained the common injunction, cannot sustain it on grounds contained in the answer, but not stated in his bill. *Cressy v. Beavan*, 99

See COSTS, 2.
SOLICITOR, 1

PLEADING.

1. On the 5th December, 1839, an information relating to a free school, to which the master and usher were two of the defendants, was heard, but judgment was reserved. Shortly afterwards, the master and usher resigned, and a new master and usher were appointed. In November, 1840, judgment was pronounced, but the decree was not drawn up. In March following, an original information in the nature of a supplemental one, was filed against the new master and usher, praying the same relief against them as was prayed by the former information, and as the informant would have been entitled to against their predecessors. In May following, the minutes of the decree on the prior information, were finally settled; and, under an order, to which the new master and usher were not parties, the decree was dated the 5th of December, 1839. In January, 1842, the new master and usher put in their answer, stating new matter, in order to show that the relief prayed by the information against them, ought not to be granted: Held that they were at liberty so to do; and, consequently, that their answer was not impertinent. *The Attorney-General v. Foster*, 282

2. The plaintiff amended his bill after the defendant had answered it. The amendments changed the nature of the case. Held that the defendant might demur to the amended bill, although he had answered that which was part of the formal groundwork both of the new and of the original case. *Cressy v. Beavan*, 354

3. After a cause had proceeded so far that the bill could not be amended, the plaintiff, without the leave of the court, filed a supplemental bill stating facts, all of which existed before the original bill was filed; but which, he alleged, he had only recently discovered. The statements and prayer of the supplemental bill were in accordance with the statements and prayer of the original bill. An objection made at the hearing, that the supple-

mental bill had been irregularly filed, was overruled. If a supplemental bill is irregularly filed, the defendant ought either to demur to it, or to move that it may be taken off the file. *Ranger v. The Great Western Railway Company*, 368

4. The 30th general order of August, 1841, applies to those cases only in which trustees have a present, absolute power to sell real estate: and the 32d order does not apply to a case in which there is only one principal and one surety. *Lloyd v. Smith*, 457

5. If a person entitled to an annuity payable out of the testator's personal estate and the proceeds of the sale of his real estate, files a bill for the administration of the whole of the testator's property, all the other annuitants and legatees must be made parties, notwithstanding the receipts of the trustees are made sufficient discharges. *Miller v. Huddleston*, 467

6. A judgment creditor, who had obtained possession of his debtor's estates under an *elegit*, filed a bill after the debtor's death, against his devisee, claiming to have a charge on the estates, under 1 & 2 Vict. c. 110, and praying to have the debt raised and paid out of the estates. The defendant, in her answer, claimed the estates, not as devisee, but under a conveyance executed by the debtor, in his lifetime. The plaintiff, instead of amending his bill, filed a supplemental bill against the defendant, praying that the conveyance might be declared to be fraudulent and void, as against him, and also that an ejectment to recover possession of the estates, which the defendant had brought shortly before she put in her answer to the original bill, might be stayed. The answer to the supplemental bill, admitted in effect, that the conveyance was voluntary. The court, however, held that, as that admission was made, in the answer to the supplemental bill, it was not sufficient to sustain the injunction. *Parker v. Constable*, 536

7. If, in an administration suit instituted by the next of kin of a testator at his death, the question is whether the testator, by the words, "my next of kin," meant his next of kin at his death or at a future period, not only the executor, but also the person or persons who may, by possibility, be the next of kin at that period, ought to be made defendants. *Urquhart v. Urquhart*, 613

8. The court will not decree a general account and administration of assets, in a suit in which the deceased is represented by an administrator *ad litem* merely. *Craft v. Waterton*, 653

See CONSTRUCTION, 1.
WAIVER, 1, 2.

POLICY OF INSURANCE.

1. Actual notice of the assignment of a policy effected with the Equitable Assurance Society, is necessary to take the policy out of the order and disposition of the assured. *Duncan v. Chamberlayne*, reported *ante*, Vol. XI, p. 123, overruled. *Thompson v. Speirs*, 469

2. Notwithstanding a policy of insurance may have been effected with a mutual insurance company, *express* notice of a deposit of it by way of equitable mortgage, must be given to the company, in order to take it out of the order and disposition of the depositor. *Ex parte Wilkinson*, 475

PORCTIONS.

See WILL, 4, 17.

PORTRAIT.

Testator bequeathed the portraits of himself, of his grandfather and grandmother, of his mother and of the Duke of Schomberg, to A. B. The testator had one portrait of himself, one of his grandfather and grandmother and one of his mother, and a three-quarters portrait and a portrait in crayons of the Duke of Schomberg, and also a picture in which the duke was represented on horseback, with a battle in the distance. Held that that picture was a portrait of the duke, and that it passed, together with all the other portraits, by the bequest. *The Duke of Leeds v. Lord Amherst*, 459

POWER.

1. Testator gave 7,000*l.* stock to trustees, in trust to pay the dividends to his son for life, and after his death, to pay the capital and dividends to and amongst all his children, at such time or times, age or ages, and in such proportions, manner and form, and for such intents and purposes in all respects, as the son should appoint; and, in default of appointment,

to pay and divide the same unto and equally amongst all the children, as they should severally attain twenty-one, and, in the meantime, to apply the dividends for their maintenance as the trustees should think fit. The son, by his will, directed that the stock should not be divided amongst his children until their mother's death, and that she should receive the dividends during her life, and apply the same, in the exercise of her sound discretion, for the best interest and advantage of his children, and that, on her death, the capital should be divided amongst the children in certain proportions. The son left eleven children, some of whom were adult: Held, that the son's will was not a good execution of the power, so far as it directed the dividends of the stock to be paid to his wife during her life. *Chester v. Chadwick*, 102

2. Under a marriage settlement, the husband and wife, having power to appoint 10,000*l.* amongst all their younger children, but in such shares as they should think fit, appointed the whole, in different sums and at different times, to four of the younger children, to the exclusion of the rest: Held, that the three first appointments were good, and only the last, void. *Young v. Lord Waterpark*, 202

3. A married lady having power, under her settlement, to dispose of real and personal property, to which her husband was entitled for his life; and her husband having agreed, subsequently to the marriage, that certain other personal property should be disposed of by her, in such manner as she thought proper, made a will commencing as follows: "I, Ann B., the wife of W. B., by the authority of my marriage articles, do make this my last will and testament. Whereas my husband is entitled to the whole of the rents and profits of my estates, both real and personal, during his life; from and after the decease of myself and my husband, I do hereby give, &c." The testatrix then proceeded to dispose of the property comprised in her settlement: and, after appointing executors, she gave all the rest, residue and remainder of her property, both real and personal, to G. H.: Held, that the will was an appointment of the property comprised in the post-nuptial agreement, as well as of that comprised in the settlement. *Harrington v. Harrington*, 318

4. Testatrix having a testamentary power of appointment in favor of her children, over certain sums of stock standing

in the names of A. and B., as trustees, gave and bequeathed, and, by virtue of every power enabling her in that behalf, appointed all the property of or to which she was then, or, at the time of her death, should or might be possessed or entitled or have power to dispose, to A. and B., upon trust, after payment of her debts and funeral and testamentary expenses, to invest the residue thereof, in their names, in the funds, or upon government or real security; and she then declared trusts in favor of her children. She died possessed of personal estate more than sufficient to pay her debts and funeral and testamentary expenses: Held, that her will was not an exercise of the power. *Clogston v. Walcott*, 523

See JOINTURE TRUST.

PRACTICE.

1. A., B. and C. being entitled to a sum of money in the bank, petitioned that it might be paid, not to themselves, but to their bankers. An order was made according to the prayer. In the Matter of the Warwick and Leamington Railway Company, 31

2. A subpoena served under the foreign process act, on a defendant resident abroad, is duly served within the eighth general order of August, 1841; and, if he does not appear, the plaintiff may cause an appearance to be entered for him and proceed to take the bill *pro confesso*. *Flight v. Camac*, 33

2. The court may permit a cause to be set down for argument on an objection for want of parties, after the fourteen days allowed for that purpose by the 39th order of August, 1841, have expired. *Cockburn v. Tolson*, 188

4. Biddings opened on an advance of 60*l.* on 430*l.* *Bourn v. Bourn*, 189

5. A writ of *ne exeat*, granted under the circumstances of the case, though not prayed for by the bill. *Barned v. Laing*, 255

6. Order made, on petition without a suit, for a reference to approve of a guardian and maintenance for an infant having 150*l.* a year arising from land. *Ex parte Angell*, 258

7. After a cause had proceeded so far that the bill could not be amended, the plaintiff, without the leave of the court,

- filed a supplemental bill stating facts, all of which existed before the original bill was filed, but which, he alleged, he had only recently discovered. The statements and prayer of the supplemental bill, were in accordance with the statements and prayer of the original bill. An objection, made at the hearing, that the supplemental bill had been irregularly filed, was overruled. If a supplemental bill is irregularly filed, the defendant ought either to demur to it, or to move that it may be taken off the file. *Ranger v. The Great Western Railway Company*, 368
8. Guardian *ad litem*, appointed to infants, under special circumstances, without a commission or their appearing in court. *Stillwell v. Blair*, 399
9. A defendant against whom a subpoena was prayed when he should come within the jurisdiction, remained out of the jurisdiction at the hearing of the cause: Held, that the form of praying the subpoena, was no objection to the bill being taken *pro confesso* against him. *Flight v. Camac*, 413
10. A supplemental bill may be filed after replication, without the leave of the court, in order to state matters which occurred before the filing of the original bill, but were not discovered until after replication. *Walford v. Pemberton*, 441
11. A, B. and C. had been co-partners in the working of certain collieries. That co-partnership having determined, and a new co-partnership having been formed between C, D. and E., the plaintiff, in a suit relating to the affairs of the late co-partnership, to which C. was a party, served D. and E., and the agent of their firm, (none of whom were parties to the suit,) with a subpoena *duces tecum*, requiring them to produce certain books of the late firm; and also moved that C. might be ordered to concur with D. and E., in producing the books, or causing them to be produced, and to give or join in giving such directions to D. and E. and the agent, as should be necessary to enable or authorize them to obey the subpoena. The court refused the motion with costs. *Stuart v. Lord Bute*, 453
12. An order to amend as the plaintiffs may be advised, does not authorize the names of co-plaintiffs to be struck out. *Sloggett v. Collins*, 456
13. An appearance cannot be entered for a defendant to an amended bill, under the 29th order of May, 1845, where the subpoena has been served upon his solicitor. *The Marquis of Hertford v. Sasse*, 489
14. Where the subpoena to appear and answer had been served in August, 1845, the court refused to allow an appearance to be entered under the 29th order of May, 1845, on a motion without notice. *Wulker v. Hurst*, 490
15. Memorandum of serving copy bill, allowed to be entered after the orders of May, 1845, were in operation, although the service would have been bad, if made after those orders took effect. *Feltham v. Clarke*, 491
16. Replication filed in July, 1845; in November following defendant moved to dismiss. After notice served, but before motion made, plaintiff filed subpoena to rejoin: Held, that though the replication was filed before the new orders of May, 1845, took effect, the filing of the subpoena to rejoin, was a nullity, under the 93d of those orders: but the court refused to grant the motion; and ordered a fresh replication to be filed without delay. *Lovell v. Bleu*, 492
17. Replication was filed before the orders of May, 1845, took effect. No proceeding having been taken within three terms after replication filed, the defendant moved to dismiss according to the old practice. The new orders of May, 1845, having come into operation in the meantime, the court ordered the plaintiff to file a fresh replication. *Routledge v. Gibson*, 493
18. The undertaking to speed is abolished by the new orders of May, 1845. *Ibid.*
19. Notwithstanding a defendant has notice of an order to amend and for him to answer the amendments and exceptions at the same time, he may file his answer at any time before the order is served. *Pariente v. Bensusan*, 522
20. Held, on a motion for leave to enter a memorandum of service of copy bill, that it is not necessary for plaintiff to swear that he examined the copy either with the office copy or the record. An affidavit that he believes it to be a true copy, is sufficient. *Legh v. Legh*, 590
21. The court is *functus officio* when it has confirmed the master's report sanc-

tioning the draining of a settled estate, under 3 and 4 Vict. c. 55. What remains to be done under the act is to be done by the master and not by the court. *Ex parte Mills*, 591

22. After decree a commission of lunacy issued against the plaintiff, who, being a married woman, was suing by her next friend. The court, on the application of her husband, a defendant, stayed the proceedings in the suit until the result of the proceedings under the commission was known. *Hartley v. Gilbert*, 596

23. An order for setting down exceptions to a report of insufficiency in an answer, if served after, though on the same day as an order to amend, and for defendant to answer the amendments and exceptions together, is irregular. *Zuhela v. Ardouin*, 631

24. The plaintiff's title to the relief prayed depended upon A. (whose administrator he was) having survived B. The answer stated that the defendant did not know and could not set forth, whether A. did survive B., or whether A. was living or dead. The plaintiff, in support of a motion for a receiver and for payment into court of money in the defendant's hands, produced an affidavit to prove that A. died after B., and to prove also a letter alleged to have been written by the defendant to the plaintiff's solicitor, and to contain an admission of the fact. The answer denied that the defendant wrote the letter, but added that it might have been written by some person in the habit of being about him: Held, that the affidavit was not admissible. *Edwards v. Jones*, 632

25. A defendant, in his answer, admitted the possession of documents relating to the matters in the bill, except the question whether A. survived B., which was the question upon which the plaintiff's title to the relief prayed depended: Held, that he was not entitled to have the documents produced. *Ibid.*

26. The court will not order money into court if the title of the party applying is at all doubtful. Neither will it order a fund standing to the credit of a cause between A. and B. to be transferred to the joint credit of that and another cause, in which it is claimed by C., adversely to both A. and B., unless C. has a perfectly clear title to the fund. *St. Victor v. Desreux*, 641

See COSTS, 2.
SOLICITOR, 1.

PRIORITY OF INCUMBRANCES.

1. The Deptford Pier Company, under the powers of their act of Parliament, issued debentures, by which they mortgaged their tolls to persons who had lent them money for the purposes of their undertaking. Two creditors of the company, who held no security on the tolls, recovered judgments in actions against the company (which were undefended) for the debts due to them. Whereupon the debenture creditors filed a bill against them and the company, alleging that they themselves had the first charge on the lands of the company, and that the plaintiffs in the action colluded with the directors of the company, and intended to sue out *elegits* and to take possession of the lands of the company; and praying for an injunction to restrain them from so doing, and for a receiver of the tolls. A demurrer to the bill, for want of equity, was allowed. *Perkins and others v. Deptford Pier Company*, 277

PRIVILEGED COMMUNICATIONS.

A. was employed, by the attorney of the plaintiff in an action, to collect evidence for the plaintiff: Held that, although A. was not an attorney, the communications made by him to the plaintiff and his attorney, relating to the evidence, were privileged. *Sleete v. Stewart*, 533

PRO CONFESSO.

A defendant, against whom a subpoena was prayed when he should come within the jurisdiction, remained out of the jurisdiction at the hearing of the cause. Held that the form of praying the subpoena, was no objection to the bill being taken *pro confesso* against him. *Flight v. Camac*, 413

See PRACTICE, 2.

PRODUCTION OF DOCUMENTS.

1. A., B. and C. had been co-partners in the working of certain collieries. That co-partnership having determined, and a new co-partnership having been formed between C., D. and E., the plaintiff in a suit relating to the affairs of the late co-

partnership, to which C. was a party, served D. and E., and the agent of their firm, none of whom were parties to the suit, with a *subpoena duces tecum*, requiring them to produce certain books of the late firm; and also moved that C. might be ordered to concur with D. and E., in producing the books or causing them to be produced, and to give or join in giving such directions to D. and E. and the agent, as should be necessary to enable or authorize them to obey the subpoena. The court refused the motion with costs. *Stuart v. Lord Bute*, 453

2. A defendant in his answer, admitted the possession of documents relating to the matters in the bill, except the question whether A. survived B.: which was the question upon which the plaintiff's title to the relief prayed, depended. Held that he was not entitled to have the documents produced. *Edwards v. Jones*, 632

3. A. was employed by the attorney of the plaintiff in an action, to collect evidence for the plaintiff. Held that, although A. was not an attorney, the communications made by him, to the plaintiff and his attorney, relating to the evidence, were privileged. *Steele v. Stewart*, 533

4. It is no answer to a motion for production of documents in the custody of a defendant, that they tend to support an indictment pending against the defendant for perjury committed in the cause. *Rice v. Gordon*, 580

PROTECTOR OF SETTLEMENT.

See FINES AND RECOVERIES.

PUBLIC POLICY.

See GAMING.

PURCHASE FOR VALUABLE CONSIDERATION.

By a marriage settlement, an estate, the property of the wife, was limited, in default of children of the wife, to trustees in trust to sell and divide the proceeds amongst the brothers and sisters of the wife. The husband agreed to sell the estate; and he and his wife joined in conveying it to the purchaser, by deed and fine. The wife died without issue. Held that the limitation in favor of her brothers

and sister, was voluntary, and, therefore, void as against the purchaser. *Cotterell v. Homer*, 506

R

RECOVERY.

See FINES AND RECOVERIES.

REMOTENESS.

If a limitation is made dependent on the happening of either of two events, one of which is too remote, but the other is not; it will take effect if the latter event happens. *Minter v. Wraith*, 52

See PERPETUITY.

RENT.

See HEIR AND EXECUTOR.

REPORT.

Two suits having been instituted on behalf of the same infant plaintiffs, it was referred to the master, to inquire and state whether the bills were for the same matters, and, if so, which of the suits it would be most for the benefit of the infants to prosecute; but the order did not give the master liberty to state special circumstances. The master reported that the two bills were, *substantially*, for the same matters, and that it would be most for the benefit of the infants to prosecute the first suit; but that, as the same person was solicitor both for the next friend and for the defendants in that suit, he was of opinion that some other solicitor should be appointed for the plaintiffs, and that part of the funds in the cause, which were then in a country bank, should be brought into court: Held, that the master had given a *qualified* answer to the question referred to him, and added suggestions which he was not at liberty to make; and, therefore, it was referred back to him to review his report. *Ganderton v. Ganderton*, 182

RESULTING TRUST

Testator devised all his freehold estates to his most dutiful and respectful nephew E. E., "upon the trusts and for the uses following;" but did not declare any use or

trust except as to one of his estates: Held, from the context of the will and a codicil thereto, that there was no resulting trust in favor of his son and heir, as to any part of his estates. *Hughes v. Evans*, 496

REVOCATION.

1. Testator drew two checks, on his banker, in favor of two of his servants, and delivered them to the servants, with directions to present them after his death. About a year afterwards he made a testamentary instrument, by which, after giving legacies to different persons, and an annuity to each of the two servants, he bequeathed the residue of his personal estate to A. B., and revoked any former will or codicil by him made, and declared that instrument to be his last will. The three paper writings were admitted to probate as constituting, together, the testator's last will. Held that, though the Court of Chancery was bound to consider the amounts of the checks as legacies, they were revoked by the subsequent instrument. *Walsh v. Gladstone*, 261

2. A. being seised in fee of an estate, subject to a term for raising 5,000*l.* for B., made a devise, in general terms, sufficient to comprise the estate. Afterwards, part of the estate was sold for the remainder of the term, for 7,600*l.* under a decree for raising the 5,000*l.*; and A. sold the reversion to the purchaser for a further sum; and an assignment and conveyance were made to complete the sales. The 5,000*l.* was paid to B. out of the 7,600*l.*; but the surplus remained in court until long after A.'s death: Held that, as an excessive sale had been made under the decree, the surplus retained the character of real estate, and that, notwithstanding the assignment and conveyance, the devise remained unrevoked with respect to it. *Jermyn v. Preston*, 356

See CONVERSION.

SECURITY FOR COSTS.

A. filed an original bill against B., and B. filed a cross bill against A. and others. They all moved that B. might give security for the costs of the cross suit. Motion refused. But leave was given to the co-defendants with A., who were not parties to the original suit to move that B. might

give security for the costs of the cross suit. *Sloggett v. Viant*, 187

SEPARATE PROPERTY.

A married lady became entitled to an estate for her separate use, under her grandfather's will, and she and her husband joined in appointing a person to receive the rents, as their agent; who, by the husband's direction, paid them to an account opened by him with H. & Co., the bankers of his wife's family; and he drew checks on H. & Co. for sums, some of which he applied for his own purposes, and the rest to keep down the interest of incumbrances on the estate. At the husband's death a large balance remained in the hands of H. & Co., which they transferred to the account of his executors; and his wife, who was his sole executrix, drew on H. & Co. in that character, and died about ten months after her husband: Held, that the balance belonged not to her, but to her husband's estate. *Beresford v. The Archbishop of Armagh*, 643

SERVICE OF COPY BILL.

See NEW ORDERS, 6, 9.

SETTLEMENT.

A married woman, having a life interest in a fund, was living with and was maintained by her husband, but out of her own income, and in a manner very inadequate to it; and he was in very embarrassed circumstances, and had no means of support except his wife's income. The court nevertheless refused to order a portion of it to be settled to her separate use. *Vaughan v. Buck*, 404

See CONSTRUCTION, 11.

LEGACY, 9.

MARRIAGE SETTLEMENT.

SHIFTING CLAUSE.

See CONSTRUCTION, 7, 8.

SOLICITOR.

The solicitor employed by the next friend, in an infant's suit, having given a notice of motion on behalf of the plaintiffs, one of the plaintiffs who had come of age, but had not disavowed the suit or

obtained an order to change his solicitor, employed another solicitor to oppose the motion on his behalf: Held, that the counsel instructed by that solicitor, were not entitled to be heard. *Swift v. Grazebrook*, 185

SPECIFIC LEGACY.

See ASSETS.
LEGACY, 7.
WILL, 14.

SPECIFIC PERFORMANCE.

A lease of mines contained a covenant that, if the lessor should, *at any time before the expiration or determination of the lease*, give notice, in writing, to the lessee, of his desire to take all or any part of the machinery, stock in trade, implements, &c., in or about the mines, then the lessee would, at the expiration of the lease, deliver the articles specified in the notice to the lessor, on his paying the value of them, such value to be ascertained in the manner therein mentioned: Held, that the covenant was so injurious and oppressive to the lessee, that the court ought not to enforce it, or to grant an injunction to prevent a breach of it. *Talbot v. Ford*, 173

See WAIVER, 1, 2.

STAMP.

The interest of a sum, secured by a mortgage of tithes, being in arrear, the mortgagor wrote and gave to the mortgagee, a letter to the lessee of the tithes, desiring him to pay the sum in arrear, to the mortgagee, and to charge it to the mortgagor, in settling for the tithes of the current year. The mortgagor sent the letter to the lessee, who undertook to pay the amount within a certain time. The payment, however, was never made: Held, that the letter was not an assignment in equity, to the mortgagee, of a debt due from the lessee to the mortgagor, but was an order for payment of money, which could not be enforced, because it was not stamped. *Lord Braybrooke v. Meredith*, 271

STAMP ACT (55 GEO. III, c. 184.)

See CHARITY, 2.

STATUTE OF LIMITATIONS (3 & 4 WILL IV, c. 27.)

2. Under a marriage settlement, a term was vested in trustees for raising 10,000*l.* for the younger children of the marriage, and, subject thereto, the estates were limited to the first and other sons in tail male. Much more than twenty years after the 10,000*l.* ought to have been raised and paid, the younger children filed a bill, to have that sum raised: Held, that the relation of trustee and *cestui que trust* existed between the parties; and, therefore, the Statute of Limitations, which enacts that money to be raised out of land shall not be recoverable, but within twenty years next after a right to receive the same shall have accrued to some person capable of giving a receipt for the same, did not apply. *Young v. Lord Waterpark*, 204

2. If husband and wife, being seised in fee in right of the wife, convey to a purchaser, by deed without fine; the wife, if she survives, and, if not, her heir, may, on the husband's death, recover the land, notwithstanding the purchaser may have been in possession for more than forty years. *Jumpsen v. Pitchers*, 327

See ACKNOWLEDGMENT OF TITLE.
TITLE.

STATUTES (PROMISCUOUS.)

See CONSTRUCTION OF STATUTES.

STERLING OR CURRENCY.

A settlement was made, in Ireland, of estates, some of which were situate there and the rest in England, by which the estates were limited to trustees for a term of years, for raising, at a future time, 10,000*l.* for portions; and interest at 5*l.* per cent. was to be raised, out of the rents, for the children's maintenance in the meantime; but the settlement was silent as to the rate of interest on the portions after they had become payable: Held, that the 10,000*l.* must be raised in Irish currency; but not with Irish interest, (6*l.* per cent.,) but at 4*l.* per cent. according to the usual course of the court. *Young v. Lord Waterpark*, 199

SUBPENA TO REJOIN.

See NEW ORDERS, 7.

SUPPLEMENTAL BILL.

See CONSTRUCTION, 1.
PRACTICE, 7, 10.

SURETY.

A. made a mortgage to B., and, by the same deed, A., and C., his surety, covenanted for the payment of the mortgage money. B. recovered the amount from C., previously to which he lent a further sum to A., and took a further charge for it on the mortgaged property. Held that C. could not compel B. to assign the mortgage to him, unless he paid off the further sum. *Williams v. Owens*, 597

T

TACKING.

See SURETY.

TENANT FOR LIFE.

1. Estates were devised to A. for life, remainder to B. for life, remainder to his sons successively in tail male. A. and B., during the infancy of B.'s eldest son, obtained an act of Parliament, vesting the estates in trustees in trust to sell: Held, that A. and B. must covenant with the purchaser for the title. *In re London Bridge Acts*, 176

2. If settled estates are sold under a power to sell them with the consent of the tenant for life, he must covenant for the title. *Ibid.*

TERM.

See MARRIAGE SETTLEMENT, 2.
WILL, 11.

TIMBER.

Testator devises his real estate to trustees in fee, in trust for T. M. for life, with remainder in trust for all the children of T. M. as tenants in common in tail, with remainders over, and, ultimately, in trust for his own right heirs: and he bequeathed his personal estate to the trustees, in trust for Mary B. for life, with remainder in trust for all her children who should attain twenty-one, with remainders in trust for T. M. and his children in like manner:

and he directed that the timber or wood which should be upon his real estates, should be, from time to time, made use of for repairing the houses thereon, or otherwise for the benefit and advantage of his estates; or that the same should be sold and the proceeds applied in the manner in which his personal estate was thereinbefore directed to be applied: Held that the direction or trust respecting the timber and wood on the estates, was not perpetual, but ceased on the inheritance vesting, in possession, in adult persons. *Silvester v. Bradley*, 75

TITHE COMMUTATION ACT.

Pending a suit for tithes, between a rector and an occupier, (in which the latter set up a *modus*.) the tithe commutation act passed; and, in the course of the proceedings under it, an action was brought, in pursuance of one of its enactments, by the rector against the land owner, in order to try the validity of the *modus*. At the trial a verdict was found against the *modus*: Held, that the verdict was admissible as evidence against the occupier, and, consequently, that the rector was entitled to file a supplemental bill for the purpose of putting the proceedings at law in issue in his suit against the occupier; and that, too, notwithstanding the act enacts that nothing therein contained shall effect the right to any tithes become due before the commutation. *Morris v. Ellis*, 1

TITLE.

If husband and wife, being seised in fee in right of the wife, convey to a purchaser, by deed without fine; the wife, if she survives, and, if not, her heir, may, on the husband's death, recover the land, notwithstanding the purchaser may have been in possession for more than forty years. *Jumpsen v. Pitchers*, 327

See VENDOR AND PURCHASER, 1.
WAIVER, 1, 2.

TOLLS.

See DEBENTURE CREDITORS.

TRUST.

Testator devised his real estates to A., B. and C., in trust that they, or the survivors or survivor of them, or the heirs of

the survivor, should, as soon as conveniently might be after his decease, but at their discretion, sell the same; and he empowered them and their *heirs* to make contracts with and conveyances to the purchasers; and declared that the receipts of them or the survivors or survivor of them, or the *heirs*, executors or administrators of such survivor, should be good discharges to the purchasers; and he directed that they, their *heirs*, administrators and assigns, should hold the proceeds of the sale upon certain trusts. A. and B. disclaimed, and C. alone acted. He devised the estates to M. and N. upon the trusts affecting the same. After his death, M. and N. agreed to sell the estates to P.: Held, that M. and N. were not entitled to execute the trust for sale, as they were the devisees and not the *heirs* of C. *Cooke v. Crawford*, 91

See PERPETUITY, 1.
Resulting Trust.

TRUSTEE

If an estate is devised to A. and his *heirs* upon certain trusts; A. ought not to devise the estate, but ought to let it descend to his heir. If he devises it, his assets ought to bear the costs of the getting the legal estate out of his devisee. *Cooke v. Crawford*, 91

TURPIS CONTRACTUS.

See GAMING.
VOID INSTRUMENT.

U

UNCERTAINTY.

See WILL, 8.

UNDERTAKING TO SPEED.

See PRACTICE, 18.

V

VENDOR AND PURCHASER.

1. Testator devised his real estates to A., B. and C., in trust that they, or the survivors or survivor of them, or the *heirs* of the survivor, should, as soon as conveniently might be after his decease, but at their discretion, sell the same: and he

empowered them and their *heirs* to make contracts with and conveyances to the purchasers: and declared that the receipts of them or the survivors or survivor of them, or the *heirs*, executors or administrators of such survivor, should be good discharges to the purchasers: and he directed that they, their *heirs*, administrators and assigns, should hold the proceeds of the sale upon certain trusts. A. and B. disclaimed, and C. alone acted. He devised the estates to M. and N. upon the trusts affecting the same. After his death, M. and N. agreed to sell the estates to P.: Held that M. and N. were not entitled to execute the trust for sale, as they were the devisees and not the *heirs* of C. *Cooke v. Crawford*, 91

2. Under an enclosure act, an allotment had been made to the improprator, in lieu of tithes; and, by the act, the tithes were to cease on the allotment being made; but the act did not authorize the sale of allotments before the execution of the award. In the interim, the improprator agreed to sell his allotment for 700*l.*, to be paid on the 25th of March then next, on a good and valid title being made and executed. The award was not made until several years after the agreement; but the purchaser had been, all along, in possession of the allotment. The court ordered him to pay four per cent. interest on his purchase money from the 25th of March next, after the date of agreement, although a good title could not be made until the award was executed. *Attorney-General v. Christ Church*, 214

3. A. agreed to sell an estate to B. for an annuity, and B. was to pay off a mortgage to which the estate was subject. Accordingly B. executed a deed, by which he granted the annuity to A. and covenanted to pay it; and, by a conveyance of even date, but executed after the annuity deed, after reciting the agreement and the annuity deed, A. and the mortgagee, in pursuance of the agreement, and in consideration of the annuity having been so granted as aforesaid, and of the payment of the mortgage money, conveyed the estate to B. The annuity afterwards became in arrear: Held, that A. had no lien on the estate for the annuity. *Buckland v. Pocknell*, 406

4. Before answer to a bill for specific performance, the plaintiff obtained an order of reference as to title. The defendant, under a threat of attachment, put in his answer, in which he alleged that one of the conditions of sale was framed with

a fraudulent intent: Held, that that allegation was not impertinent. *Emery v. Pickering*, 583

See AGREEMENT.

TENANT FOR LIFE, 1, 2.

VOLUNTARY SETTLEMENT.

WAIVER, 1, 2.

VENUE.

See INJUNCTION, 2.

VESTING.

Testator directed his trustees to pay the interest of 2,500*l.* to his daughter for life, for her separate use, and, after her death, for the maintenance of all her children, until they should attain twenty-one, and then the principal to be equally divided amongst her said children; and, if his daughter should die without leaving a child, then that the principal should be divided amongst all his own children then living. The daughter had children, but they all died under twenty-one: Held, nevertheless, that the legacy vested in them. *Parker v. Golding*, 418

VESTING AND DIVESTING.

See WILL, 3, 4, 9.

VOID INSTRUMENT.

The plaintiff cohabited with M. S., a married woman; and, in consideration of her agreeing to continue to cohabit with him, he executed a deed whereby, "for the consideration therein mentioned," he granted to a trustee for her, an annuity to commence on his death, marriage, or withdrawing his protection from her; and covenanted to charge any land that he should become possessed of, with the annuity; and, for further securing the annuity, he executed a bond, in the penalty of 1,000*l.*, to the trustee, and gave a warrant of attorney to enter up judgment against him on the bond; and judgment was entered up, against him, at the suit of the trustee, for 1,000*l.* and costs. Some years afterwards, the plaintiff married, previously to which he had put an end to his intercourse with M. S.; and, having been advised that the annuity deed and collateral securities, which he stated to have been obtained from him for the consideration of future cohabitation, were not

binding upon him, he refused to pay the annuity. In consequence of which, M. S., in the trustee's name, brought an action against him, on the judgment. The bill prayed that the annuity deed and collateral securities might be declared void and be delivered up to be cancelled, and that the trustee might enter up satisfaction on the judgment, and that the action might be stayed. The trustee put in a general demurrer, which was allowed. *Smyth v. Griffin*, 245

VOLUNTARY SETTLEMENT.

By a marriage settlement, an estate, the property of the wife, was limited, in default of children of the wife, to trustees in trust to sell and divide the proceeds amongst the brothers and sisters of the wife. The husband agreed to sell the estate; and he and his wife joined in conveying it, to the purchaser, by deed and fine. The wife died without issue. Held that the limitation in favor of her brothers and sisters, was voluntary, and, therefore, void as against the purchaser. *Cotterell v. Homer*, 506

W

WAIVER.

1. Conditions of sale stipulated that the sale should be completed on a certain day; and that objections to the title not made within twenty-one days from the delivery of the abstract, should be considered as waived; and that, if the purchaser should not comply with the conditions, his deposit should be forfeited, and the vendor be at liberty to resell the property. The purchaser did not deliver his objections until several weeks after the expiration of the twenty-one days, and after the day appointed for completing the purchase: the vendor's solicitor, however, received them, and entered into a long correspondence with the purchaser on the subject of them, but without coming to a satisfactory conclusion. Finally, the vendor resold the property, (but at a less price,) notwithstanding the purchaser protested against the resale, and gave notice to the vendor of his intention to file a bill to enforce his contract. About six months afterwards he filed his bill, making the auctioneer and the purchaser at the resale, to whom he had, some months before, given notice of his prior contract, co-defendants to it. The court held that the benefit of the conditions

had been waived by the vendor's solicitor, and decreed a specific performance, with a reference to the master as to title; and dismissed the bill with costs, as against the auctioneer, because he denied that he had ever intended to part with the deposit, and without costs as against the purchaser at the resale, who claimed the benefit of his contract, if the court should think that the plaintiff's ought not to be performed. *Cutts v. Thodey*, 206

2. Where objections to title are to be considered as waived, unless made within a certain time after the delivery of the abstract: *Qu.* whether that condition can be insisted on, if the abstract is very defective? *Ibid.*

WARD OF COURT.

See INFANT, 6.

WILFUL NEGLECT OR DEFAULT.

Neglect or default may be wilful, though it may have been unintentional, and have arisen from forgetfulness. *Elliott v. Turner*, 477

WILL.

1. Testatrix gave to the eldest son of her daughter who should be living at her own decease, ten guineas, and added that she left him no larger sum, because he would have a handsome provision from the estate of her late husband and the estate of his own father, (who was still alive,) and she gave the residue of her property to all the children of her daughter, except the daughter's eldest son, or such of her sons as, by the death of an elder brother, should become an eldest son, equally to be divided amongst them when the youngest should attain twenty-one. The daughter's eldest son was provided for in the manner mentioned, but he died before the youngest child attained twenty-one, and the provision did not devolve upon the daughter's second son: Held, nevertheless, that the latter was excluded from participating in the residue. *Livesey v. Livesey*, 33

2. Testator directed his trustees to sell his real and personal estate, and to pay the interest of the proceeds to his daughter for life, and, after her death, to assign the principal and the parts of his real and personal estate remaining unsold (if any)

to her children, when they should attain twenty-one; and, if his daughter should die without leaving issue, or leaving issue, all of them should die under twenty-one and without issue, then to assign the proceeds and the parts of his real and personal estate remaining unsold (if any) to his personal representatives, his, her or their heirs, executors, administrators and assigns. The daughter, who was the testator's next of kin, at his death, died without having had a child: Held, that by "issue," the testator meant "children;" and that the persons who were his next of kin at his daughter's death, were entitled under the ultimate trust. *Minter v. Wraith*, 52

3. Testator directed the rents of his estates to be accumulated for five years; "at the end of which time I leave as follows: to H. G. 200*l.*; and to W. B., W. C., E. M. or as many as are living, 100*l.* each; and to M. N., S. H., S. S., or as many as are then living, 50*l.* each; and the same sum to be given at the expiration of ten years from the time of my death, and ditto at the end of fifteen and twenty years from my death." Two of the legatees died between the end of the tenth and the fifteenth year after the testator's death, having received the payments which became due to them at the end of the fifth and tenth years: Held, that the rights of the legatees named in the will, to receive the payments, were contingent on their surviving the times of payment, and, consequently, that the executors of the then deceased legatees could not claim any payment at the end of the fifteenth year. *Bruce v. Charlton*, 65

4. Testator bequeathed his residuary estate to trustees in trust, to pay the interest to his niece for life, and directed, that, after her death, the trustees should pay, apply, transfer and dispose of the residue amongst her children, equally to be divided between them, share and share alike, to be paid to sons at twenty-one, and to daughters at that age or on their marriage: and he empowered the trustees, after his niece's decease or in her lifetime with her consent, to raise, pay and apply, for the preferment and advancement of any of her children, all or any part of their presumptive portions under the trusts aforesaid: Held, that there was no gift to the children, except in the direction to pay to them; and, therefore, their portions did not vest in them until such of them as were sons attained twenty-one, and such of them as were daughters

either attained that age or married. *Chevaux v. Aislalie*, 71

5. Testator devised his estates to trustees, in trust to settle and convey the same to the use of or in trust for G. R. (who had then no issue) for life, without impeachment of waste, with remainder to his issue in tail male, in strict settlement: Held, that the words "in tail male" were descriptive, not of the issue, but of the interest that they were to have; and that the estates ought to be settled on G. R. for life, without impeachment, &c., with remainder to his sons, successively, in tail male, with remainder to his daughters as tenants in common in tail male, with cross remainders in tail male. *Trevor v. Trevor*, 108

6. Testator made two wills, one of his estates in Sussex, and the other of his estates in Bedfordshire. By the latter, he devised those estates to trustees, in trust to settle them on G. R., who was heir to the barony of D., for life, with remainder to his issue in tail male, in strict settlement: "Upon the like condition to that I have made in my will of my Sussex estates, so far as the change of circumstances will permit, that the said estates shall go over to the party next entitled, on the person for the time being possessed, becoming entitled to the barony of D." Held, regard being had to the will of the Sussex estates, that the succession of a child or any male issue of a child of G. R. to the barony, ought not to exclude that child, or his issue male, from the enjoyment of the Bedfordshire estates, unless some other child, or the issue male of some other child of G. R. were in existence, to whom those estates might go over. *Ibid.*

7. Testator directed his estates to be settled on G. R. for life, with remainder to his issue in tail male, in strict settlement; upon condition that all persons from time to time to come into possession of the estates, should take and use his name and arms: Held, that the estates ought to be settled on G. R. for life, with remainder to his sons, successively, in tail male, with remainder to his daughters as tenants in common in tail male, with cross remainders in tail male; and that the proviso to be inserted in the settlement, as to taking the name and arms, and for giving over the estates on default, ought to be so expressed, as to take away the estates from the defaulting party and his descendants only; that is, if a grandson of G. R. were the defaulting party, the

consequence ought not to extend to his younger brothers. *Ibid.*

8. Testator bequeathed his residue to his first cousins, the children of his father's brother, of the name of C. The testator's father had two brothers of the name of C.; both of whom had left children: Held, that the bequest was not void for uncertainty; but that the children of both the brothers were entitled to share in the residue. *Hare v. Cartridge*, 165

9. Testatrix bequeathed the residue of her funded property, in trust for her niece for life, and, after her death, to be equally divided amongst all her children, whether sons or daughters, share and share alike; in case it should happen that there was but one child at the niece's death, then to go to that one only child; and in case of failure of issue, to go as the niece should appoint by her will. The niece had eleven children; three of whom died in her lifetime: Held, that all the children took vested interests, and, as more than one survived their mother, there was no divesting of interests. *Templeman v. Warrington*, 267

10. A., being seised in fee of an estate subject to a term for raising 5,000*l.* for B., made a devise, in general terms, sufficient to comprise the estate. Afterwards, part of it was sold for the remainder of the term, for 7,600*l.*, under a decree for raising the 5,000*l.*; and A. sold the reversion to the purchaser for a further sum; and an assignment and conveyance were made to complete the sales. The 5,000*l.* was paid to B. out of the 7,600*l.*; but the surplus remained in court until long after A.'s death: Held that, as an excessive sale had been made under the decree, the surplus retained the character of real estate, and that, notwithstanding the assignment and conveyance, the devise remained unrevoked with respect to it. *Jermyn v. Preston*, 356

11. Testatrix bequeathed a leasehold house and 3,000*l.* stock to trustees, in trust to permit her daughter to receive the rents and interest for life, for her separate use; and, from and immediately after her daughter's decease, she gave the rents and interest to the heirs of the body of her daughter lawfully begotten; but, in case her daughter should happen to die without leaving any lawful issue living at the time of her decease, she gave the house and the stock over: Held, that the daughter took the property absolutely. *The Earl of Verulam v. Bathurst*, 374

12. Testator devised all his real estates to trustees; as to his *freehold* messuage, farm, lands and hereditaments in the county of B., in trust for C. The testator had a farm in that county, consisting of a messuage and 116 acres of land, of which the messuage and the greater part of the land were freehold, and the other parts leasehold for long terms of years at peppercorn rents; and they were interspersed with and undistinguishable from the freehold part, and had been demised therewith as one farm, at one entire rent, and the testator had always treated and dealt with them as freehold: Held, nevertheless, that the leasehold parts were not comprised in the trust. *Stons v. Greening*, 390

13. Testator bequeathed his residue to trustees, in trust for J. F., for life, and, after her death, for her children; but in case J. F. should survive her mother, and die without having had lawful issue, then in trust for the brothers and sisters of J. C. But in case J. F. should die in the lifetime of her mother without lawful issue, then the testator directed the trustees to retain, out of the residue, sufficient to produce 150*l.* a year, and to pay the annual produce to the mother for life; and, after her decease, he gave the principal so to be retained to the person or persons who would be entitled thereto in case J. F. had survived her mother and died without lawful issue. J. F. died without issue in her mother's lifetime: Held, that the whole of the residue, except the fund for paying the annuity, was undisposed of. *Clarke v. Butler*, 401

14. A testator having three and a half per cents, East India stock, Danish bonds, and other property, bequeathed to his wife, during her widowhood, the interest of all the money he had or might possess in the funds or other securities: "And I further bequeath, to my wife, the interest of any other property I do or may possess, to be enjoyed by her so long as she remains single:" Held, that the testator's widow was entitled, as against the residuary legatees, to enjoy, *in specie*, every portion of her husband's property which came within the description of money in the funds or other securities, and, consequently, his three and a half per cents, East India stock and Danish bonds. *Oakes v. Strachey*, 414

15. A legacy of 10,000*l.* consols, "now standing in my name," held, from the context of the will, not to be specific. *Aulher v. Aulher*, 422

16. Testator bequeathed to his daughter Elizabeth 2,000*l.* for life, the principal to be equally divided among her children, should they have attained twenty-one: and, to the two children of his late daughter Jemima, 1,000*l.* each, to be paid on their attaining twenty-one: Held, that the legacies to the children were contingent on their attaining twenty-one, and that they were not entitled to interest in the meantime. Testator left to his daughter Jane the sum of 2,000*l.*, to be settled on her when she married, or to be paid to her on her attaining twenty-one: should she die not leaving issue, the 2,000*l.* to fall into the residue of the estate. Jane married in her father's lifetime. The court directed the legacy to be settled in trust for her separate use for life; remainder for her children living at her death, according to her appointment; in default of appointment, for her sons at twenty-one, and her daughters at that age or on marriage; remainder for her next of kin; and, if she had no child living at her death, the legacy to become part of the testator's residue. *Young v. Macintosh*, 445

17. Testator bequeathed 10,000*l.* in trust for his son, J. L. J., for life, remainder in trust for the children of J. L. J., when and as they should attain twenty-one, as tenants in common; and, if any of them should die before their shares became payable, leaving issue, their shares to be paid to their issue; but if any of them should die before their shares became payable, leaving no issue, their shares to be paid to the survivors at the same time as their original shares should become payable; and if J. L. J. should have no child, or, having such, they should all die under age and without issue, then the trust fund to sink into the residue, which the testator gave to two of his other children. J. L. J. had four children, all of whom attained twenty-one. One of them died, in his lifetime, without issue: Held, that "payable" meant "attain twenty-one," and, consequently, that one-fourth of the fund vested in the deceased child. *Jones v. Jones*, 561

18. A testatrix, in her will, used the following expression: "Observing that F. Beales and his family are my residuary legatees for all but cash or moneys so called." F. Beales had nine children living at the date of the will and at the testatrix's death, and the testatrix died possessed of a promissory note payable to herself or order, some long annuities, Columbian bonds and money in her house

and at her banker's: Held, that by "Francis Beales and his family," the testatrix meant Francis Beales and his children, and that they took the note, annuities and bonds, as joint tenants, those articles being neither cash nor moneys so called.

Beales v. Crisford,

592

19. Testator directed one-half of the interest of his residue to be paid to his daughter and only child, and the other half to his wife, during their joint lives; and that, if his daughter survived her mother, or married and left issue, then that the whole of the capital should be paid to her, after his wife's death; but if she died first, without marrying or leaving issue, then that the trustees *should accumulate the interest* of the residue so far as it was not directed to be paid to his wife; and that, *on her death*, one-half of the capital should be divided amongst *his nearest of kin*, and the other half amongst his wife's nearest of kin. The daughter was the testator's nearest of kin at his

death. She died a spinster, before her mother. At the mother's death the testator's sister was his nearest of kin: Held, that by "my nearest of kin," the testator meant his nearest of kin *at his own death*, and not at the death of his wife; and, consequently, that the personal representative of his daughter, and not his sister, was entitled to one moiety of the residue.

Urquhart v. Urquhart,

613

20. Testatrix concluded her will as follows: "My house in Trevor square I give to my brother, as residuary legatee, for the benefit of his children:" Held, that the brother took the residue, as well as the house, in trust for his children. *Inderwick v. Inderwick*,

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See EXONERATION OF PERSONAL ESTATE.

LEGACY, 4, 6, 10.

MAINTENANCE, 2.

NEAREST OF BLOOD.

POWER, 3, 4.

REVOCATION.

MEMORANDA.

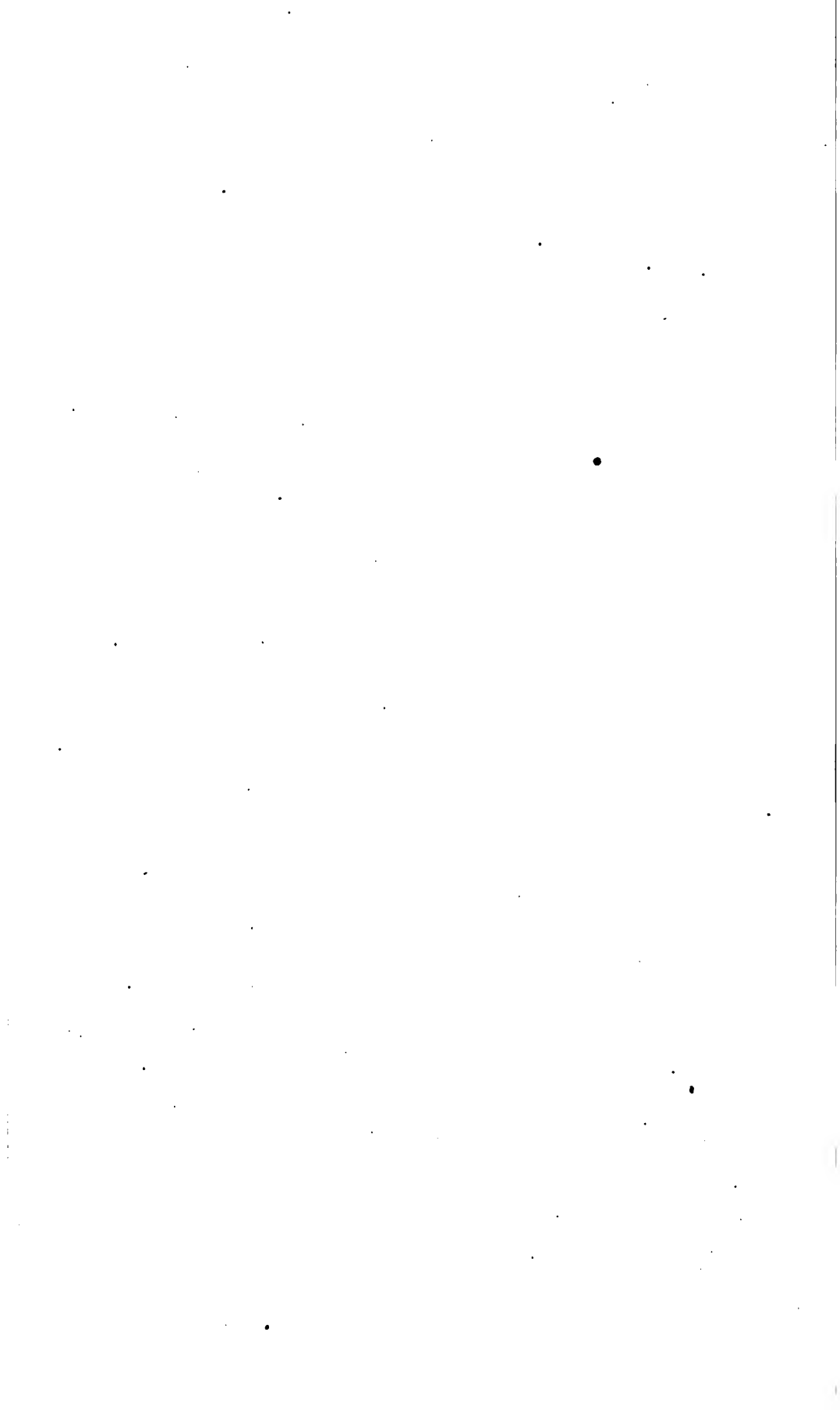
The order in *Bruin v. Knott*, *ante*, Vol. XII, p. 459, was varied by L. C. See 1 Phill. Rep. 572.

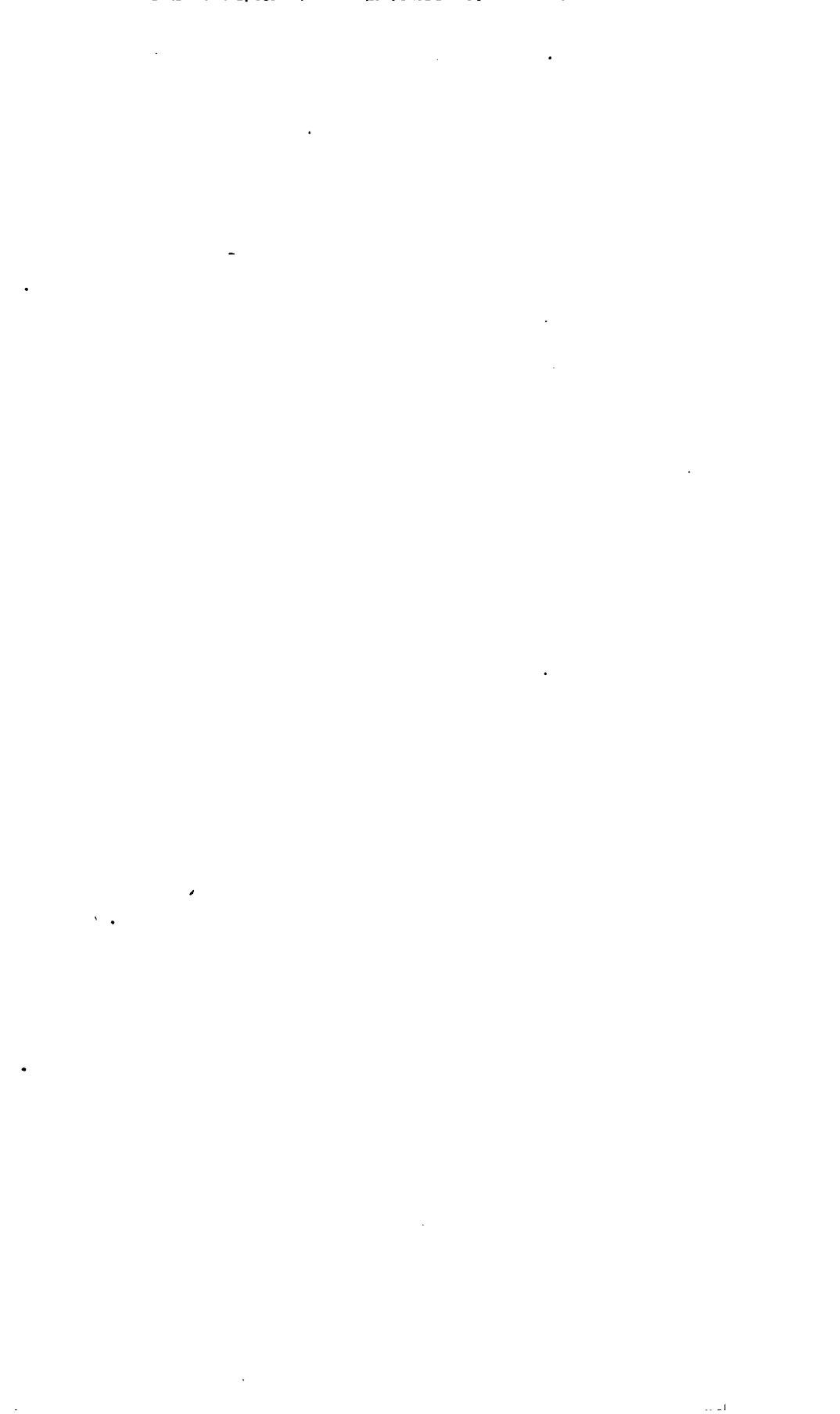
The decree in *Young v. Lord Waterpark*, *ante*, p. 199, was affirmed by L. C. in December, 1845.

The decision in *Steele v. Stewart*, *ante*, p. 533, was affirmed by L. C. See 1 Phill. Rep. 471.

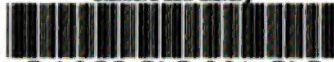
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